UNITED STATES SUPREME COURT.

CHARLES A. HILLS, RECEIVER OF TAXES, ETC., ET AL., APPELLANTS,

against

THE NATIONAL ALBANY EXCHANGE BANK, APPELLEE.

THE BOARD OF SUPERVISORS OF ALBANY COUNTY, PLAINTIFFS IN ERROR,

against

EDWARD N. STANLEY, DEFENDANT IN ERROR.

BRIEF OF APPELLANTS AND PLAINTIFFS IN ERROR.

WHEELER H. PECKHAM AND RUFUS W. PECKHAM, *of Counsel.*

IN THE

SUPREME COURT

OF THE

UNITED STATES

CHARLES A. HILLS, RECEIVER OF TAXES, ETC., AND ORS., APPELLANTS,
against
THE NATIONAL ALBANY EXCHANGE BANK, APPELLEE.

In Equity. No. 817

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY, PLAINTIFFS IN ERROR,
against
EDWARD N. STANLEY, DEFENDANT IN ERROR.

No. 847.

STATEMENT AND BRIEF FOR APPELLANTS AND FOR PLAINTIFFS IN ERROR.

These cases have been advanced on the docket by special order made on application to the court, and have been ordered to be heard as one cause.

The first cause (No. 817) is an appeal from a final decree entered upon the decision of the Circuit Court in and for the Northern District of New York, granting an injunction restraining perpetually the appellants from collecting or receiving the taxes levied upon the stockholders in the Exchange Bank situated in Albany, and being a National bank.

The second cause (No. 847) is here upon a writ of error sued out to bring up for review a final judgment in favor of defendant in error and against plaintiffs in error for some sixty odd thousand dollars, entered in the clerk's office of the Circuit Court in and for the Northern District of New York. The recovery is for the amount of taxes collected for a number of years back for the county of Albany, from the stockholders in the National Albany Exchange Bank; the amounts of such taxes being formally collected by levy upon funds in the said bank, amounting to the total of the taxes against the shareholders therein by reason of their ownership of such shares.

There was thus a formal refusal to pay, and each year's tax upon the shareholders in the said bank was paid in that way, by a formal levy upon the amount of money necessary to pay such taxes for the stockholders, and found at the banking-house upon each occasion.

PARTICULAR STATEMENT OF FACTS AS TO FIRST CAUSE, No. 817.

The reason for the existence of this case lies in the fact that this court in the People v. Weaver (100 U. S., 539), decided that as the general law of New York, for the purpose of taxation, permitted the owner of personal property to deduct his debts from the total valuation of such property, the owner of bank stock in a National bank had the same right to deduct his indebtedness from the sum total of his personal property, *including his bank stock*, and the judgment of the Court of Appeals of New York, which denied that right, was reversed and the cause remanded for further proceedings in conformity with the opinion of this court.

That decision was announced in the spring of 1880, and soon thereafter the first above entitled cause was commenced, to wit, on the 14th of May, 1880. (Record, fol. 1.)

The bill of complainant prayed for an injunction to restrain the collection of any portion of the taxes levied upon their shares against the stockholders in the said bank, under and

by virtue of chapter 761 of the Laws of 1866, which is the same statute referred to in the case of People v. Weaver and which statute is set forth at length in the appendix to this brief, and is there marked "A." (Page 42.)

This injunction was asked for on the ground, as alleged, that the act of 1866, as construed by the courts, did not permit a deduction from the valuation of said shares by reason of the indebtedness of the person owning the same, although such deduction was allowed to owners of other species of personal property, and the complainant charged that the whole statute was therefore void, as being in conflict with section 5219 of the Revised Statutes of the United States. That section of the Federal statute is also set forth in the appendix hereto, and is marked "B." (Page 45.)

Another ground upon which the injunction was asked was that the shares of National banks were in Albany all assessed at par, instead of their actual value, and that such assessment resulted in a violation of the Federal statute, and hence was void. (Record, fols. 16, 17.)

Also upon the ground, as set forth, that the assessment at par of the shares of stock in complainant's bank, and also at same sum upon shareholders in the Mechanics and Farmers' Bank (a State bank located at Albany), the shares in complainant's bank being worth very much less than shares in the said State bank, operated as an assessment at a greater rate upon shares in complainant's bank than upon shares in State bank, and hence was a violation of the said Federal statute. (Record, fol. 18.)

Allegations of assessments upon manufacturing corporations, private bankers, builders' loan companies, etc., were made, and charged to be at such rates that an assessment for bank shares in complainant's bank at par made such assessment at a greater rate than upon other moneyed capital in the hands of individual citizens. (Record, fols. 21, 23.)

There was but a single person whom the bill alleged made an affidavit and demand of the assessors, required by law, to

reduce the amount of his assessment on account of indebtedness, and such demand was refused. (Record, fol. 24.)

The bill alleges that there were others who were indebted and who would have made the demand if they had supposed it would have been granted (record, fol. 26), and proofs were made on the part of three or four shareholders, that they were indebted and would have made the affidavit and demand if they had supposed it would have been granted, but as matter of fact no such affidavit or demand was made on the part of any other than the one person alleged in the bill. (Record, fols. 103, 106, 107, 109, 110.)

The answer of defendants denied that the statute of 1866 was void, or that the assessments were designedly made upon stockholders at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. (Record, fol. 50.) It denied also all knowledge or information as to rate of taxation by assessors of building companies, manufacturing companies and other property, and as to private bankers and as to rate of taxation upon property throughout the State outside of Albany. (Record, fols. 51, 52, etc.)

The complainant duly filed its replication. (Fol. 60.)

The act of 1850, relating to taxation in the city of Albany, is to be found in the appendix hereto (i. e., those parts material to the present inquiry). It is chapter 86 of the laws of 1850, and is in the appendix marked "C." (Page 46.)

Those portions of the Revised Statutes of the State of New York relating to general taxation and to the taxation of corporations, etc., are also to be found in the appendix, and marked "D." (Page 48.)

Proofs were taken in the suit showing the manner of assessments as pursued by the assessors of Albany city (record, fol. 76, *et seq.*), and that the assessors in making their assessments were not guided by malice or bias against National bank shareholders, nor did they make their assessments with a purpose of discriminating against the holders of that kind of property. (Record, fol. 85.) Mr. Williams gave the

value of the stock in the several banks (State and National) in the city of Albany (record, fols. 94, 98), showing some National bank stock of more and some of less value than complainant's stock, and some stock in State banks more and some of less value than that of complainant.

The court decided that the act of 1866, providing for the taxation of National banks, was void and inoperative as to shares of stock in National banking associations, and that the assessments upon shares of stock in complainant were illegal and void, and an injunction was granted perpetually restraining the collection of any portion of such tax. (Record, decision of court, fol. 62.)

No tender was alleged in the bill of complaint, and it was admitted that none was ever made of any portion of the tax, the collection of the whole of which was enjoined. (Record, fol. 72.) Prior to the passage of the statute of 1866, thus declared void, the legislature of the State of New York passed "An act to enable the banks of this State "to become associations for the purpose of banking under "the laws of the United States," being chapter 97 of the Laws of 1865. The act was passed for the purpose alleged and was intended to comply with all the provisions of the Federal statute upon the subject of National banks. The tenth section of such statute provided for the taxation of such shares and used a portion of the language of the Federal statute, but not all, and this court held that the statute as to that section was not warranted by the Federal statute, because it did not provide that the tax imposed should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State, there being no legislation by the State taxing *shares* in State banks at all, though there was a tax on the capital of such banks. This decision is reported in 3 Wall., 573, under title of Van Allen v. The Assessors. The tenth section of such act and the Federal statute as it existed when the decision was made, are to be found in the appendix marked, respectively, "E" and "F." (Page 53.)

The principal question discussed and decided in the case just cited was as to the legality of the legislation assuming to tax these shares under any circumstances, as the shareholders claimed it could not be done. The court held it could, but held the taxing clause contained in the tenth section was not in conformity with the act of Congress, and hence that special tax was illegal. With such decision just made, the legislature of the State of New York, at its next session, passed the act in question, that of 1866, which the Circuit Court has herein also declared void.

ASSIGNMENT OF ERRORS.

(1.) The court below erred in deciding that the act of 1866, above alluded to, was void or inoperative.

(2.) In deciding that the assessment or taxation of the stockholders of complainant upon their shares of stock in complainant, set forth in the bill of complaint, was illegal and void.

(3.) In refusing to dismiss the bill of complaint with costs because the act aforesaid was valid, and if the assessment were at too great a rate then because complainant had not tendered the fair amount of such tax as should have been levied and assessed.

PARTICULAR STATEMENT OF FACTS AS TO SECOND CAUSE, No. 847.

On the 9th of August, 1880, the plaintiff below commenced this action, to recover of the Board of Supervisors of Albany county, the amounts of taxes that had been levied and collected against the several stockholders in the National Albany Exhange Bank, from the assessment of such taxes for the year 1873 down to and including those assessed in 1878 and collected in 1879, with interest and costs, being in all over $60,000. There are twelve causes of action alleged in the complaint, but they are all based upon substantially the same facts.

The first seven causes of action (excluding the second)

relate to the amounts collected in several different years, from one Chauncey P. Williams, a stockholder in the said bank, and the amounts being collected by levy upon property. The second cause of action is in the case of one Martha Williams, also a stockholder, in one year (1874), and collected by levy in the same way. The fourth cause of action sets out the making of an affidavit on the part of Mr. Williams (record, fol. 44), and a demand to reduce his assessment on account of his indebtedness. This is the only cause of action where any such allegation is made, and the only one in reality where there is any pretense that any such was made. The other five causes of action are those which are alleged to have arisen in favor of the other stockholders in the said bank, under the same general circumstances as are set forth in the first cause of action.

The first cause of action, while setting forth the assessment upon the bank shares of Mr. Williams, the action of the assessors regarding the same, and of the Board of Supervisors, and the levy and collection by the marshal of the amount thereof, alleges also that the assessment was made under color of the act of 1866, and not otherwise, and that such act was void as being in conflict with the provisions of the laws of the United States, because the State act did not permit a deduction of debts from National bank shares which was permitted from other personal property, and also because the assessment was at a greater rate than upon shares in a State bank and on other moneyed capital in the hands of individual citizens, and the assessment was therefore illegal and void. (Record, fol. 4, *et seq.*) An assignment of claim to plaintiff was alleged in all the cases.

The answer, after denying various matters, denies that the act of 1866 is in conflict with the provisions of the Federal law, or that it is void, and denies that the assessments were at a greater rate, etc., than allowed by law; denies that the Supreme Court has decided that the act of 1866 was void, and alleges that the assessments were made properly and by assessors who had jurisdiction, etc. (Record, fol. 170.)

The Circuit Court decided in favor of the plaintiff below, and found the several facts as alleged in the complaint (record, fol. 178) as to the assessments, collections of taxes, assignments, etc., and gave judgment for plaintiff below on the single ground that the act of 1866 of the legislature of New York was void as in violation of the Federal statute on that subject. Judgment was thereupon duly entered. (Record, fol. 188.)

Exceptions to the findings of the court were duly filed (record, fol. 198), which included an exception to what is termed the sixth finding of fact (record, fol. 184), that the act of 1866 did not permit a deduction of the indebtedness from the bank stock. This is really a question of law, and hence the bill of exceptions states that it was founded entirely upon the statutes of New York and the decisions of the courts of the State referred to by the court, and upon no other evidence. (Record, fol. 194.) The court passed upon no other question than the invalidity of the act of 1866, as is seen by the bill of exceptions and the admission therein contained. (Record, fol. 195.) The defendants sued out a writ of error from this court.

ASSIGNMENT OF ERRORS.

(1.) The Circuit Court erred in deciding that the act of the New York legislature of 1866 did not permit the deduction of debts owing by the owners of stock in banks in the assessment thereof for taxation.

(2.) The court also erred in deciding that the said act was in conflict with the provisions of the laws of the United States, in that the taxation by State authority of such shares should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the act was void because such a rate of taxation was permitted.

(3.) The court also erred in deciding that the assessments upon the shares of stock in the said bank were unauthorized and void, and that the sums collected of such stockholders

and paid into the treasury of Albany county, were received unlawfully, and were the property of such stockholders.

(4.) The court also erred in giving judgment for the plaintiff for the amount of such taxes.

This court, from the foregoing summary, will see these facts stand forth prominently: That if the plaintiffs below finally succeed in these cases, the shareholders in the National Albany Exchange Bank for seven years will have escaped the payment of one single penny of taxes by reason of their ownership of these shares, and half a million of dollars of property in Albany city, sharing in the protection accorded to other property therein and in the benefits of municipal government — fire, police, lights, etc. — will yet receive all such benefits and protection at the expense of other property and of citizens located and living in Albany. Such gross injustice and such a palpable evasion of every duty of citizenship should not be permitted to exist and succeed, if a court of justice can find any means consistent with the general rules of law to prevent it.

It will be borne in mind that in the second entitled cause (the action to recover the back taxes) the recovery is permitted on the ground of the invalidity of the statute of 1866, in that it does not grant deductions for debts, yet with the exception of one single stockholder in one of the six years, not a man ever asked for a reduction of his assessments by reason of indebtedness, not a man ever made an affidavit as required by the statute showing any indebtedness, and there is no proof that a single man (with the one exception above noted), in all those six years was, as matter of fact, indebted to the extent of one dollar. And the same facts as to there being no affidavit and no demand made, exist in the equity suit, with the same exception of one man. And as no tender of any amount has ever been made, it is seen that the suits rest for a basis really upon the single claim of the invalidity of the whole statute of 1866, because no deduction for debts is as they claim provided for therein.

POINTS.

FIRST. The act of 1866, already referred to, should not be construed as preventing the deduction of indebtedness from the value of the shares of stockholders in National banks.

(*a.*) It will be well to look at the history of this statute and of the decisions of the State and Federal courts relating thereto.

The act of 1866 was undoubtedly intended to be a strict compliance with all the conditions of the Federal act permitting the taxation of shares in National banks by and under State authority. As already stated, it was passed to obviate the difficulties which had been decided by this court to exist in the act of 1865, above alluded to. By the act of 1865, which enabled State banks to become National banks under the act of Congress, taxation of shareholders *in such banks only* was provided for, leaving the taxation in regard to State banks as it had been, i. e., on the capital stock. The act of Congress provided not only that the taxation of these National bank shares should not be at a greater rate than upon other moneyed capital in the hands of individual citizens of the State, but that such rate should also "not exceed the rate imposed upon the "shares in any of the banks organized under au- "thority of the State where such association is "located." As is seen, there was no taxation of shares as such in State banks, and hence this court held that the section of the State statute which provided simply that the tax should not exceed the rate that is assessed upon other moneyed capital in the hands of individuals of the State, did not comply with the act of Con-

gress, there being no legislation of the State to tax *shares* in State banks at all. Consequently, *any* tax upon shares of National banks must necessarily and inevitably be a tax exceeding the rate imposed under authority of the State upon shares in banks existing under such authority. Hence the act was declared void, meaning, of course, that section relating to taxation. The act of 1866 was then passed, which altered the manner of taxation as to *State* as well as National banks, and provided for taxation of the shareholders in both in precisely the same way, which avoided the criticism made as to the act of 1865, and then used the same language as used in the act of Congress, viz., that the rate thus imposed should not be greater than was assessed upon other moneyed capital in the hands of the individual citizens of the State, and it was undoubtedly supposed and intended that in this way the Federal statute was fully complied with, and all the conditions upon which taxation was permitted entirely fulfilled.

(*b.*) Under this statute of 1866, the case of People v. Dolan (36 N. Y., 59) arose. A demand was made by an owner of shares in a National bank to reduce his assessment, including that laid upon him by reason of such ownership, to a certain sum, because of his indebtedness. This demand was refused, and the Special and General Terms of the Supreme Court of the State held that such refusal was erroneous; but the Court of Appeals held, on the contrary, that it was proper, and that *as thus decided the statute was not inconsistent with the provision of the act of Congress providing for taxation at a rate not greater, etc.* This conclusion of that learned court was based

undoubtedly upon what it was conceived had been decided by this court in the People ex rel. Dner v. The Commissioners of Taxes, etc. (4 Wall., 244), where Mr. Justice Nelson, in writing as to the meaning of the very same words, "not at a greater rate than is assessed upon "other moneyed capital in the hands of indi- "vidual citizens," used language which the Court of Appeals understood as deciding that very question. (See page 256, in the report in the fourth of Wallace.) That this is so, reference may be had to the opinions of the court in the Dolan case, where Judge Hunt refers to the case of the Commissioners of New York, decided in the Court of Appeals, and Mr. Justice Parker, at page 73, refers to the same case in this court and states that this court therein agrees with the construction given to those words in the act of Congress by the Court of Appeals.

There was no appeal taken from that decision.

(c.) Thus matters rested for about eight years, when Mr. Williams, a stockholder in the National Albany Exchange Bank made an affidavit as to indebtedness and then made the same demand for reduction as was made in the Dolan case. The question was the same.

The courts of New York, assuming the validity of the law as held by the Court of Appeals, and, as was thought by the Supreme Court of the United States, denied the *mandamus* asked for to compel the assessors to make this reduction. This case was carried here by writ of error, and this court, with the question squarely before it, assuming that the State statute was correctly decided by the Court of Appeals, held that those words in the act of Congress comprised

all the necessary steps by which the tax was finally laid, including valuation, assessment, &c., as well as mere rate after assessment, and that where the general law of the State permitted the citizen to deduct his debts from the total of his other property, the same permission must be accorded him in his character of National bank shareholder and with reference to that species of property. (People v. Weaver, 100 U. S., 539.) This court therefore reversed the judgment of the State courts and remanded the case for further proceedings in conformity to the opinion of this court. This court did not assume to decide that the whole statute of 1866 was void, as distinguished from that portion of it which, it was assumed, prevented the allowance of the deduction. That question was not before this court, was not discussed by counsel nor by the court itself in the opinion. The actual result of the decision was a simple reversal, with directions as above stated. It only held that Mr. Williams in his assessment was entitled to his deduction as claimed, but it did not hold or assume to hold that the statute of 1866 was wholly void.

(*d.*) The question thus comes up, what is now the law of New York with reference to this point as to the statute of 1866, whether it does or does not give this authority to deduct debts? It will be recollected that nowhere in the statute itself is it said that no deduction shall be allowed. It is simply a case of construction and decision by the courts as to its meaning.

The plaintiffs below contended:

1. That the Court of Appeals of New York has decided that this statute does not per-

mit the deduction of debts from the assessment upon bank shares.

2. That the court below was and this court is absolutely bound by the decision of the State court as to the meaning of this statute, local in its nature.

3. That as so construed the statute is at variance with the Federal statute as to the rate of taxation, and is hence void.

To this reasoning the answer is:

1. That the Court of Appeals decided the question as to the meaning of the statute under entirely different circumstances both as to law and fact.

2. That under such a change of circumstances the Circuit Court, sitting in New York, had, and this court in review of its decision has the right to consider the question as open, and to be decided as the court shall be of the opinion the Court of Appeals would now decide and as the law would seem to be under such changed circumstances as to fact.

The different circumstances under which the Court of Appeals construed the statute have been already stated. It is apparent it construed the statute under a belief that this court had already construed *precisely identical language in the same way*, when used in the act of Congress. Now it is apparent that the same language, though used in two different statutes, yet being upon the identical sub-

ject and providing for the same thing, cannot mean two different things, and, therefore, as the Supreme Court of the United States has now given an authoritative and final decision as to the meaning of those words as used in the act of Congress; and as the meaning must, in the nature of things, be the same in both statutes, and as the State statute is following out the permission of Congress by the use of the same words, this exposition of their meaning by this court must be regarded as the correct one, and hence the decision of the Court of Appeals in regard to such meaning is no longer applicable to the different facts now existing from those which existed when the decision referred to was made.

It cannot be contended that this court, the Circuit Court of the United States, or an inferior State court ought for a moment to be bound by a decision of a superior State court made at a former period upon a state of facts wholly inapplicable to the case in hand, and not existing at the time when such prior decision was made. A decision of a court is simply evidence of what the law is, and that decision must be looked at in the light of the facts existing when it was made and upon which alone it was based. Decisions of courts do not constitute laws. As is said by this court, "they "are, at most, only evidence of what the "laws are, and are not of themselves "laws. They are often re-examined, re- "versed and qualified by the courts them-

"selves whenever they are found to be "defective or ill-founded or otherwise "incorrect."

See Swift v. Tyson, 16 Peters, 1, etc.

The decision of the Dolan case, as to whether the act of 1866 permitted deductions, or rather permitted the general law in relation to deductions, to have effect as to shares in National banks, was so obviously made in the manner it was, upon the theory that, as so construed, it complied with the Federal statute, that it would seem impossible to successfully contend the reverse.

(c.) There is no difficulty in holding that the statute of 1866 does permit this deduction, so far, that is, as the statute itself is concerned. Verbal criticisms, it is true, were made in the opinion of the Court of Appeals as to the language used in the act that the assessment should be *on the value of* their shares, and it was argued it could not be thus taxed and a deduction allowed. But it is apparent that such language might very well have been used for the purpose of providing the taxation of the stock at its actual instead of at its *par* value, as the capital of the banks had been some time before that taxed, and that the use of the word *value* had no reference whatever to such a taxation as should prevent the operation of the general statute applicable to all persons indebted, and permitting them to deduct such indebtedness from the assessment.

Nor is there any difficulty in the provision that the tax shall be laid at the place where the bank is located, and not elsewhere. The statute

of 1880 provides just that — and also provides that the deduction shall be allowed, without any further details. This is mere matter of secondary importance, matter of detail and procedure, and has and should have no weight in the proper construction of the statute under the altered circumstances.

See act of 1880, Appendix, marked "C," sec. 3.

Nor should the fact that the Court of Appeals in the very case which came here and was reversed, held the same doctrine as in the Dolan case and upon its authority have any additional weight. The last case was decided only upon the authority of the Dolan case, knowing it was coming here, and it is obvious the court itself had no faith in the doctrine of the Dolan case. It was a simple *pro forma* decision, and added not an ounce to the weight of that case, as a precedent. And it is *since* that second and *pro forma* decision that the circumstances have altered by the happening of facts which change and reverse entirely the very ground-work and foundation upon which the Dolan case rested, and hence under such altered circumstances this decision, as mere evidence of what the law was under other and different facts, is *not evidence* of what it is under the circumstances of this case.

(*t.*) The cases cited by counsel for plaintiff below in regard to the effect to be given to the decisions of State courts as to the statutes of their States, are not adverse to the above views. The cases cited were Leffingwell v. Warren, (2 Black, 599 at 603), and Douglass v. County of Pike (101 U. S., 677).

As is said in Green v. Neal's lessee (6 Peters, 291 at 299), "the inquiry is, what is the *settled* "*law of the State at the time the decision is made*. "This constitutes the rule of property within "the State by which the rights of litigant "parties must be determined." And again, in same case, the court said in speaking of the decision of State courts, "reference is here made "*not to a single adjudication, but to a series* "*of decisions which shall settle a rule.*"

In Chicago City v. Robbins (2 Black., 418, at page 428), the court says: "Where rules of "property in a State are fully settled *by a series* "*of adjudications*, this court adopts the deci- "sions of the State Courts."

Again, in Township v. Marcy (92 U. S., 289), this court said: "When the construction of the "Constitution or the statutes of a State has been "fixed by *an unbroken series of decisions* of its "highest court, the courts of the United States "accept and apply it in cases before them."

In Gelpcke v. City of Dubuque (1 Wall., 175), the court said: "Although it is the prac- "tice of this court to follow the latest *settled* "adjudications of the State courts giving con- "struction to the laws and constitutions of their "own States, it will not necessarily follow deci- "sions which may prove but oscillations in the "course of such judicial settlement. *Nor will it* "*follow any adjudication to such an extent, as to* "*make a sacrifice of truth, justice and law.*" And in Pease v. Peck (18 How., 595, at 598) the court said: "There are, it is true, many "*dicta* to be found in our decisions, averring "that the courts of the United States are bound "to follow the decisions of the State courts "on the construction of their own laws. But

"although this may be a correct, yet a rather "strong expression of a general rule, it cannot "be received as the enunciation of a maxim of "universal application. Accordingly, our reports "furnish many cases of exceptions to it."

And when the court says that a settled construction must be adopted as part of the text of the statute, reference must be had to the case in hand in which the expression is used to determine just what force and effect must be given to such expression. To abstract a single expression from an opinion of the court or even the reasoning of a court from the facts to which that reasoning is meant to apply, has a tendency to misrepresent one judge and to mislead another.

See 1 Am. Law Rev. (N. S.), 829, note.

In the case of Douglass v. County of Pike (*supra*), the decision was that the *settled* judicial construction of a statute, *so far as contract rights were thereunder acquired*, is as much a part of the statute as the text itself.

All the cases in which such expression is used will be found to be cases where a statute had been judicially construed in one way, under which property rights had been acquired, and the statute had furnished, as thus construed, a rule of property, and this court held itself under such circumstances bound by such construction as to all rights of property acquired under it, and that a subsequent alteration of the statute either by legislation or by judicial construction would not operate as against such rights of property, or the title thereto, acquired in the meantime.

Here no such principle can obtain. The simple question is, what is *now* the law of New York? not what did its highest court at some

former time and under a different state of facts and circumstances determine that it *then* was.

(*g.*) It is clear, therefore, that the Circuit Court should have examined the statute to see what it really did mean in the light of the decision by the Court of Appeals in the Dolan case, and of this court in the Williams case. It is a familiar rule, that where of two possible ways of construing a statute, one will render it in some of its parts invalid and the other entirely legal, and either view may rationally be adopted, that view will be taken by the court which renders the act legal in all its parts.

Roosevelt v. Godard, 52 Barb. (N. Y. Sup. Court Reports), 533 at 545.
Turnpike Co. v. McKean, 6 Hill, 616 at 619.
In re Cooper, 22 N. Y., 67 at 88.

Here is a general law in the State which provides that a citizen may deduct his debts from the amount of his personal assessment. A special act in regard to taxation in Albany contains the same provision. If it be held that in the State generally the general law governs, and in the city of Albany the special law to the same effect governs in the assessment of taxes, even on National bank shares, then the statute of 1866 is legal and valid. That under the changed facts the law is really to that effect in the State of New York seems to be plain and should be so held.

(*h.*) It is not deemed of the least consequence as throwing any light upon the proper construction to be given the statute of 1866, that the legislature of New York, subsequent to the decision of this court in the Williams case, and after it was publicly known what monstrous claims were

made on the part of the banks as to the effect of that decision, should, to remove all possible doubt for the future, have passed the statute of 1880, providing (in so many words for the granting of a deduction for indebtedness on the part of National bank shareholders with regard to their bank shares. In no sense can it properly be said to be any legislative interpretation of the meaning of the act of 1866, and even if it were it is wholly unimportant.

SECOND.—But the question of the illegality of the act of 1866 can, in the equity suit, be raised only on behalf of one person, and in the action at law only as to the tax paid in one year by one tax-payer (Mr. Williams).

(*a.*) This act of 1866 provides for the taxation of shares in National banks, and the process of assessment and taxation may be carried out under that act. The claim that such act is void, because it does not permit a deduction of debts from the value of the citizen's personal property, including his bank shares, is a claim which can only be made by some one having a pecuniary interest in such claim, *i. e.*, one who stands in the position of a debtor who, but for the law, would be authorized to insist upon this deduction.

It goes without saying that no person who did not own stock in a National bank could raise the question as to the illegality of the act. However illegal it may be, courts do not sit to administer the law upon abstract questions. There must be a case involving property or personal rights before courts will decide a proposition as to the validity or invalidity of a statute, or, in deed, any question at all.

This is not a case where of necessity the illegality enters into each assessment. Assuming it to be illegal, it is illegal only as to those who are indebted and make the proper affidavit and demand.

See Tiernan v. Rinker, 102 U. S., 123.

It has been claimed that a shareholder can take any ground of invalidity that exists, for if the law be invalid no assessment at all can be made against him, and hence if one is made he is pecuniarily damaged to that extent, and has a right to take the point. If the whole statute were necessarily invalid, so that no legal assessment could be made upon any one, the position would be sound. But the contention is that the statute is only illegal and void as to those who are indebted, and only as to those because it does not give them deduction for such indebtedness. Unless, therefore, a person is indebted, he can not raise the question. Undoubtedly the State must pass a law in accordance with the act of Congress; but if it do not, but antagonizes such act in some one particular, the question arises whether such antagonism renders the whole act void or only that portion which violates the Federal law. We claim that the latter is the result in this case. We do not deny that the antagonism may in some cases be so great and so far-reaching as to invalidate a whole act, but we deny that any such result obtains in this case. There being only one person to raise this question a tender of the rest of the tax should have been made, under well settled principles.

(*b.*) It seems to us that these views are in accordance with the grounds of the decision in Evansville National Bank, of Evansville, v. Thomas P. Brit-

ton, treasurer, etc., decided in the Circuit Court of the United States for the district of Indiana, and now before this court on writ of error from the decision just spoken of.

(c.) To the proposition that the person claiming a deduction on account of his debts should have complied with the statute by making his affidavit and a demand for a deduction, the plaintiffs below answered, the assessors would not have given the deduction, and as it was, therefore, an useless or vain thing to do, the law did not require them to do it.

This, it is respectfully submitted, is no answer at all. It was not an useless or a vain thing to do, within the meaning of the law not requiring such acts. If the action of the assessors were a finality, and nothing more could be done by the party after making the affidavit and demand than to submit, the answer in such case might be a sufficient one. The affidavit and demand can only be said to be a step in the process of securing the right, but it is a condition precedent to the taking of any further or other step. It is the first process by which the party aggrieved brings the violation of his rights to the attention of the court in a legal and proper manner. It is the manner pointed out by the statute; the procedure necessary to be taken in order that the court may judicially see that such rights have been violated. If, on such a demand, supported by the proper affidavit, the refusal to deduct is made, *then* and not till then has the person the right to appeal to the court to secure his legal deduction. And if an inferior court deny it, he can appeal, until at length he comes here with his complaint and here receives what this court

has said he was entitled to. The courts have stood wide open at all times and he had but to take the steps pointed out by the law, to compel all the officials to finally accede to his demands. This answers the evidence as to there being some parties indebted (as proved in the equity case) who would, as they said, have made the application if they had supposed it would have been granted. Their way was to have made the application nevertheless, and when refused, a resort to the courts on that refusal would have finally resulted in their obtaining their rights. Instead of which they sleep upon them, and at last, just when the tax is to be enforced, the bank, in behalf of every shareholder, those who were not indebted as well as the others, steps in and enjoins the collection of the whole tax. This is not justice or common sense.

THIRD. In any event the whole statute of 1866 is not void. That part only is void which comes in contact with and violates the Federal law; and if any portion remain after the illegal part is eliminated, such portion may be enforced and carried out to its full extent. This question is of somewhat the same nature as the proposition discussed in the last part of subdivision *a* of point second, but it is at the same time more broad and far-reaching.

(*a.*) The general principle is well understood in all courts that if it be possible to hold one portion of a statute valid, while deciding another portion to be invalid, the courts will do so unless the provisions be so intimately blended that they cannot be operative separately, and so that it is

obvious that the legislature would never have passed the valid parts if those declared void could not be carried into effect.

People v. Bull, 46 N. Y., 46 at 68.
Gordon v. Cornes, 47 N. Y., 608-617.
Boese v. King, 78 N. Y., 474.
In re petition of Roberts, 81 N. Y., 62 at 67.
In re Application Village of Middletown, 82 N. Y., 196, 202.
Allen v. Louisiana, 103 U. S., 80 at 83, 84.
Railroad Cos. v. Schutte, 103 U. S., 118 at 142.

In first above cited case (People v. Bull) one section of an act of the legislature lengthened an elective officers term, and the second section fixed the date of the next election for the same office, and it was held that although the first section was void, yet the second remained, because not so dependent upon or connected with the first section, but that it could be operative without it.

In the second case (Gordon v. Cornes) a section (the seventh) of the Normal School act of 1866 which appropriated $12,000 annually to the support of such schools out of the common school fund, was held unconstitutional in that respect, but the balance of the act was sustained on the ground that the legislature had power to carry into effect the general designs of the act, and though erring in detail, as it could be easily corrected, it should not be held to defeat the whole act. The act was providing for normal or training schools for teachers, and the seventh section provided the only means for carrying out its provisions, viz., by an *annual* appropriation of $12,000 from the common school fund. And yet it was held separable and the court sepa-

rated the valid from the void part, and upheld the valid.

In the case of the Village of Middletown (82 N. Y., *supra*), an act in relation to supplying water to the village, among other things provided for an appeal from the award of commissioners to take necessary lands, and on such appeal provided further that the court might increase or diminish the compensation. This was held to be void, but that the rest of the act was valid, including the provisions for an appeal, but not the provision allowing the increase, etc. The court said: "No one can doubt that if the "attention of the legislature had been drawn to "its lack of power to enact the provision objected "to, *it would nevertheless have passed the act "without the unconstitutional provision.*"

In the cases in this court, the first (103 U. S., 80) recognizes the same principles, but holds that one of the sections of the act there in question, which specifically authorized the issue of the bonds, was unconstitutional, and that the other sections of the act, or the charter of the city, gave no authority to make the subscription in question, and hence that it was void.

In the other case (103 U. S., 118 at 142) this court held that part of the statute providing for the issuing of certain bonds by the State of Florida having been decided to be unconstitutional by the courts of that State, yet as the same statute gave a lien to the State on certain property of the railroad company, the unconstitutional part of the statute might fall, while the statutory lien could be upheld. The court saying, "under these circumstances it seems to us "that the unconstitutional part of the statute "may be stricken out, and the obligation of the

"company, including its statutory mortgage in "favor of the State bondholders, left in full "force. The striking out is not necessarily by "erasing words, but it may be by disregarding "the unconstitutional provision and reading the "statute as if that provision was not there."

These various extracts from cases and citations thereof, have not been made because there is supposed to be any doubt as to the general principles of the law in this regard, but only to refresh the recollection of the court as to the application of these general principles in reported cases. Within these principles we affirm that this illegal provision as to the refusal to grant a deduction for indebtedness is the only provision of the statute of 1866 that falls by reason of such illegality.

(*b.*) Now assume that this statute had ordained in so many words, "no deduction shall be allowed "from the valuation of the shares of stock by "reason of the indebtedness of the owner "thereof."

There is a general statute of the State providing that such deduction shall be allowed the owner of all personal property.

This court says that where such a statute exists it is a violation of the act of Congress to refuse such deduction to a National bank shareholder. This statute assumes to thus refuse such deduction.

In that respect it is a violation of the Federal law, and such provision is void. With that provision therefore stricken out, or in the language of this court, "disregarded," three questions arise: (1.) Is there enough of the statute left to become operative as thus separated from that

provision? (2.) Is the part thus left capable of separation? (3.) Would the legislature have passed the rest of the statute for taxing these bank shares (so far as such intention can be gathered from the act itself and from those contemporaneous events of which courts will take judicial notice), if the refusal to allow this deduction were known to be illegal and therefore could not be inserted in the statute?

(1.) There is enough left of the statute, with the refusal to deduct indebtedness, "disregarded," to become fully operative. There is nothing which is not provided for by the act as thus existing, from the first step towards assessment to the compulsion of payment by the marshal of the city, under the warrant of the proper officer.

It is claimed there is no way provided in the act for those who are non-residents of the ward in which the bank is located, to secure their deduction as demanded. This is not strictly accurate or true. There is the general law, which provides that any person indebted may have his indebtedness deducted. True, there is another general law which provides that the citizen shall be assessed for his personal property at the place of his residence, and of course, unless a bank shareholder, his residence will be the only place of his assessment for such kind of property, and his application for reduction would be there made. But assume he is a bank shareholder, and that the bank is located in another ward

than that of his residence, what is he to do then? Why, the statute is perfectly plain — it permits a deduction on account of his debts. If he has already secured that deduction at his place of residence, then he has had all he can claim. If his debts are greater than his assessment at his place of residence, he can have such assessment taken off, and he can then make the same demand at the place where the shares are taxed, and an examination will disclose the amount of his indebtedness, and the amount of his other assessment, and the balance of indebtedness still remaining, and that balance can be deducted. Or, if the affidavit is conclusive, he can make such a statement as shall be in accordance with the facts, and obtain full relief thereby. In truth, all these little criticisms in relation to the actual carrying out of the statute, are criticisms regarding the merest details, the small matters relating to practice, and do not in the slightest degree touch or affect the great question as to the power to operate the statute with this refusal to deduct disregarded. There is nothing in the statute which cannot be thus fully carried out.

(2.) The second question, whether the statute, as left after disregarding the refusal to deduct, can be separated, is substantially answered in this instance by the answer to the first question. Nothing more need be said regarding it.

(3.) Can it be determined that the legislature would have passed the act without this provision in it? We think it entirely clear that it can be so determined.

The section of the act of 1865, relating to taxation, had been declared void, and there were no means or method existing by which this banking capital invested in National banks could be taxed. The banks themselves could not be taxed to any extent, owing to their investment of their funds in non-taxable securities. The amount of this taxable property invested in banks was known to be large [then over $100,000,000, Van Allen v. The Assessors, 3 Wall., 573, at 579; People v. Dolan, at page 64], and the State, it may be decided at once, never meant to voluntarily give up its right to tax such property. The act of 1866 was then passed, which provided expressly for the taxation of shareholders in banks generally, including both State and National banks in such designation.

The great and important feature of the statute was the taxation of this large amount of taxable capital. The intention of course was to comply with the condition upon which the right to tax depended. The case need only to be stated to be decided that the taxing of this property would have been provided for by the legislature, coupled with any condition or subject to any exception which Congress might have annexed to its grant of power to tax.

The scheme of not permitting the share-

holder to deduct his debts was a mere subsidiary provision, wholly disconnected from the main, important and essential feature of providing at all events for some taxation of such capital. It would seem as if there could be no successful denial of the proposition that the legislature would still have passed this act in all its essential and valid features as it now exists without the provision as to refusing deductions for indebtedness.

(c.) It makes no difference, in the above reasoning, that nowhere in the statute is there any express language prohibiting this deduction from being allowed. There is a simple absence in the body of the statute of any language granting the right. This, the Court of Appeals (under the circumstances already detailed) held, prohibited the deduction from being granted, and as it prohibited the deduction from being granted in such case, it is claimed that it operates (upon this right) as a repeal by implication of the general statute which provides for a reduction for debts to be made from the taxable personal property of the citizen. But the Federal statute is the superior in this respect, and by virtue of its provisions this court has held that where any owner of property is entitled to such deduction on account of debts, the owner of National bank shares, similarly indebted, shall also be entitled to such deduction. Consequently that construction of the statute which prevents it is of no effect as against the Federal enactment, and the shareowner claims and must receive his exemption under the general statute which for such purpose the statute providing for taxation of bank shares was incapable of successfully repealing.

(*d.*) We claimed below that the act of Congress said the owner of bank shares was entitled to this deduction, and because the State act, as construed, refused this right which the Supreme Court held the shareholders entitled to, such decision did not wipe out the law, but only prevented the working of the illegal portion and left the balance of the statute remaining. To this it was answered that the act of Congress nowhere provided anything about a deduction of debts, and that if a State permitted no deduction of debts to any one, the statute might be valid. The criticism, as a merely verbal one, is undoubtedly correct; but the idea intended to be conveyed by our claim is as we think entirely sound. The act of Congress does not in terms provide for deductions or say anything on the subject. It makes use of certain language, which, when taken in connection with the fact that our general laws permit deduction for indebtedness to all other classes of property, substantially enacts that the owner of this class of property shall have the same right. The result is the same in either case, that it is by virtue of the act of Congress alone that the right to this deduction on the part of the shareowner exists, though not by the use of exactly those words, yet it is by use of language which in the circumstances of the case and under all the facts amounts to exactly the same thing as if it had used such language.

(*e.*) (1.) The case of The People vs. Commissioners of Taxes (94 U. S., 415, 418), affords no ground for holding the whole of the statute of 1866 void.

That case simply says that the statute of 1865,

providing for the taxation of National banks in New York, was held void in this court in the case of Van Allen vs. The Assessors, on the ground therein stated, viz., that the system of taxation raised by that statute was illegal, and that the clause of that act laid hold of in the case in 94 United States was a mere proviso or qualification of that system. The proviso was that the assessment should not be more than at the par value of the shares. When the balance of the section was declared void there was nothing left upon which this special provision could hang. It stood alone in a section where every other feature had been declared void, and it was wholly inoperative without such balance and inseparable from it. There is no pretense that the court meant to avoid the whole statute of 1865. The other sections related to transforming State into National banks, and had no kind of connection with taxation.

(2.) The case of Van Allen itself affords no sustenance to this claim of our opponents. It has already been cited in the history of this statute of 1866. It is seen that it was wholly impossible to tax a share of stock in a National bank, belonging to a single individual in the State, without at once necessarily and inevitably violating one of those conditions of the act of Congress upon which alone an assessment could in any possible event be based, viz., the condition that the assessment should not be at a greater rate than upon shares in a State bank. And as at that time shares as such in State banks were not assessed at all, any possible assessment of shares in National banks, of course, violated that condition. Thus striking out the provision

which necessarily violated the Federal statute, there was nothing left! There was no authority to assess any bank shareholder a penny in any National bank. So, of course, that section of the act must have been declared void.

(3.) The case of the United States v. Reese (92 U. S. 215) has no bearing upon the one before the court.

In the case cited it was an effort to legislate generally upon the subject of elections, basing the right under the fifteenth amendment. The statute granted the power to punish in broad and general terms, in sections covering more than the wrongful refusal to receive a vote on account of race, color, etc. It was not pretended that a wrongful refusal other than on account of race, etc., could be cognizable by the United States Courts. Yet the statute in the third and fourth sections attempted to confer such power. The court held they were illegal and that they could not be confined to a wrongful refusal on account of race, etc., because the words were general, and to import such words as would limit the power within legal limits, was to pass a new statute. But in the case here no such principle comes into play.

There is, first, a general grant of power to tax, and, second, a limitation in the way of a condition of its exercise. The statute of the State is passed under this general grant of power, and, in words, is precisely within the conditions specified. But by the construction given it by the courts it was held not to allow a deduction for debts, and the Supreme Court held such refusal was in conflict with the act of Congress. Being so, such refusal falls, but does it carry

down with it the whole act? Suppose in the Reese case there had been one section wholly legal, limiting the action under it to a wrongful refusal by reason of race, etc. Then, supposing there was another section, such as the one declared void, would such a decision invalidate the legal section? No one would so claim. But it was only because the legislation in the third and fourth sections was too broad to be legal that they were declared void. There was nothing to separate in those sections, for they had but one subject-matter, and that was illegal. When so declared there was nothing left of the sections. The court simply said we cannot supply words of limitation upon this subject, which are not in the sections, for that would substantially be passing a new act instead of construing an existing one.

But in the case at bar the general legislation upon the subject of taxing bank shares is legal and action can be had under it. The only provision that is illegal is the refusal to deduct debts, and being illegal it falls, leaving a perfect system of taxation in force, capable of application to every shareholder in the bank.

There are sections of the very act under consideration in the Reese case which are not touched by the decision therein, and which are as valid as ever.

In our case the courts are *not* called upon to legislate anything *into* the act of 1866 in order to make it legal. They are simply called upon to say that a refusal to grant a deduction is illegal, and being illegal no such provision exists, and, therefore, the act of 1850 applies to all people, and all are entitled to a deduction upon compliance with the provisions of that general act.

(*f.*) This statute of 1866 *does* assume to provide for assessing *all* the shareholders in National banks, and says so in so many words. It only can be claimed that after an assessment of *all*, the statute means that those who are indebted shall not escape on such indebtedness. But the result of the decision of this court in the Williams case is that they shall thus escape, and as such escape is effected by virtue of the act of Congress and the language therein used, any prohibition or construction to the contrary in our statute is rendered wholly void. Being thus void, the general act of 1850 steps in and provides the same means to the shareholder to effect his deduction that it provides for any other citizen.

(*g.*) It is said that the courts will take judicial notice that about every one is indebted, and that this court took such notice in the Williams case. This is a mistake. Mr. Williams proved that he was indebted. The court said, the act of Congress means that if you grant deductions to any one who is indebted you must grant it in this case, and as you do grant to any one indebted, you must here.

There was no proof or assumption that any one else was indebted as matter of fact, for it was wholly immaterial; the one material thing being that if indebted, such deduction could be claimed, and it was the possibility and not the actual fact of indebtedness which was material.

But even if it should be assumed that every one is indebted, it makes no difference here. In that case it would simply be that every one could claim the deduction, notwithstanding the utterly invalid prohibition against allowing the same. And the balance of the statute could be fully operated.

(h.) The direction to the assessors, contained in the general law, to set down in the fourth column the full value of all the taxable personal property owned by the citizen after deducting the just debts owing by him is not material in this inquiry. No means are given them in any event in the first instance to find out what those debts are, and full opportunity is given each person by making his affidavit, to know just what debts and their amount that he owes, and the assessors are to deduct that sum. That provision in one view is in full force in the case of the bank shareholder, because the decision of this court is that the provision refusing it in his case is illegal and void. He thus has full opportunity afforded him to ask and obtain the reduction, and if refused he has the same remedy that any other taxpayer has by an appeal to the courts. And on this question he could appeal from an adverse decision of the State courts to this court, as was done by Mr. Williams, who thus obtained what this court declared to be his rights.

In no view of the case can it be successfully maintained, as it seems to us, that any other effect of the decision by this court exists than that the person indebted has the right to deduct from his assessment on his bank shares the amount of his indebtedness, and the act of 1866, with that exception, continued in full force.

(i.) The act of the legislature in 1880 (see page 54 of appendix hereto, where it is printed) is substantially like the act of 1866, excepting in that it allows this deduction; but it does not profess to, and in fact does not provide the details by which such indebtedness is proved, leaving that to the

general laws; and under this act of 1880 no difficulty in practice has been experienced. This is a complete answer to the proposition that there is no process in the act of 1866 by which this reduction can be claimed. The right to claim it being in existence by the law of congress, as decided by this court, the general law furnishes a complete method by which to obtain it in practice.

(*k.*) This whole question was argued at great length before Judge Blatchford of the Circuit Court of the United States, and he was clearly of the opinion that the whole act of 1866 was not void, and that the effect of the decision in the Williams case was simply to allow the deductions theretofore claimed. But the judge subsequently found he was a stockholder in New York banks, which were raising the question, and he therefore refused to make any formal decision in the case.

The Attorney-General of New York also took the same view of the result of the decision of this court, in an opinion given to one of the State officers.

FOURTH. There are no other grounds upon which these actions can be maintained.

(*a.*) The claim that the shareholders in the National bank were assessed at a greater rate than those in a State bank, or than certain corporations, by reason of an over-valuation of the stock in the bank, does not afford ground for calling the assessment void. It is a simple claim, in legal effect, that the assessments are partial, unequal and unjust. But the shares are liable to *some*

assessment for taxation, and *some* tax should be paid upon them. The assessors had jurisdiction, therefore, to tax these shares, and at what sum was a matter of judicial decision. (Williams v. Weaver, 75 N. Y., 30.) If, as a result, they were taxed unequally, unjustly and untairly, the fair amount for which they ought to have been taxed should have been paid or tendered, and an injunction asked for the balance.

State Railroad Tax Cases, 92 U. S., 575.
Pelton v. Nat. Bk., 101 id., 143.
Cummings v. Nat. Bk., 101 id., 153.
National Bk. v. Kimball, 103 id., 732.

No allegation is contained of a tender made in either case, and none was in fact ever made, the plaintiffs below basing their claim substantially on the utter invalidity of the whole assessment, and the court below based its decision in both cases solely on that ground.

(*b.*) But in no event was there any such general and indiscriminate practice to assess National bank shareholders unjustly or improperly. There were some National banks in Albany whose shares were assessed at par, which were of very much more and some of less value than those in complainants, the latter being worth 130 (record, fol. 94); the National Commercial were worth 260; Merchants' National, 200; First National, 160; while those in the City National were 105 to 110; the Union about 110, and those in the Albany county (a State bank), barely worth par. (Record, fol. 98.) This shows there was no disposition to deal unfairly with shareholders in National banks in any event. None of these banks complained. As to corporations, an assess-

ment against them was not an assessment upon moneyed capital in the hands of individual citizens. This principle was decided in the Van Allen case, and in many subsequent cases by this court. The truth was the assessments were made at par to aid the banks generally, and so that no division of the "surplus" of the banks should be made among stockholders, to the detriment of the citizens of Albany desiring to use banking capital. It is readily seen that the special injustice done the shareholders in complainant's bank, by an assessment at par, when at the least calculation they were worth 130, is not very great. The truth is, this whole litigation has been instigated by a jealousy of one bank, which was founded in the early part of this century, and over which the venerable Thomas W. Olcott had presided for many years, and it has been a covert attempt to have that bank assessed, as a substantial result, upon its whole surplus, and to thus compel a division thereof, so that it might then stand more on an equality with this comparatively new banking institution.

FIFTH. In the action at law there is one cause of action which has no defense — and it is set out in the fourth count of the complaint. In that case the party made his affidavit and demanded a reduction of the assessment against him, which was refused. (Record, fols. 34, 44.) In no other case was there any affidavit or demand made. But in that case the assessors had no jurisdiction to assess. With that exception, there was complete jurisdiction to make an assessment, and

money cannot be recovered back which was obtained by reason of an assessment which the assessors had jurisdiction to make.

The Bank, etc., v. Mayor of New York, 43 N. Y., 184.

Newman v. Supervisors, etc., 45 N. Y., 676-687.

In the Newman case, the court in permitting a recovery said: "That the county had received money "by acts which were void for want of official power "and jurisdiction to do them."

To the same effect is Bank of Chemung v. Elmira (53 N. Y., 49 at 52), where Church, Ch. J., says: "The "assessment and tax against plaintiff were void. They "were made and levied, not only without authority, "but in violation of an express statute."

If there is over valuation, and thus a greater rate of taxation, the remedy is, as has been seen, a tender of amount fairly due, which shows jurisdiction to make some assessment, and hence an over-valuation is not a wholly void assessment.

SIXTH. The decree in the equity suit should be reversed, with directions to enter a decree dismissing the bill, with costs, and the judgment in favor of defendant in error in the action at law should also be reversed, with directions to enter a judgment in his favor for the amount alleged in the fourth cause of action, after deducting the costs of plaintiffs in error in this court and in the court below.

R. W. PECKHAM,

Solicitor for Appellants and Attorney for Plff's in Error.

WHEELER H. PECKHAM AND
RUFUS W. PECKHAM,

Of Counsel.

APPENDIX,

CONTAINING

CITATIONS OF STATUTES REFERRED TO IN FOREGOING BRIEF.

"A."

CHAPTER 761.

"AN ACT authorizing the taxation of stockholders of banks "and the surplus funds of savings banks.

"PASSED April 23, 1866.

"*The People of the State of New York, represented in "Senate and Assembly, do enact as follows:*

"SECTION 1. No tax shall hereafter be assessed upon the "capital of any bank or banking association organized under "the authority of this State, or of the United States, but "the stockholders in such banks and banking associations "shall be assessed and taxed on the value of the shares of "stock therein; said shares shall be included in the valua- "tion of the personal property of such stockholder in the "assessment of taxes at the place, town or ward where such "bank or banking association is located, and not elsewhere, "whether the said stockholder reside in said town or ward "or not, but not at a greater rate than is assessed upon "other moneyed capital in the hands of individuals in this "State. And in making such assessment there shall also "be deducted from the value of such shares such sum as is "in the same proportion to such value as is the assessed "value of the real estate of the bank or banking association, "and in which any portion of their capital is invested, in

"which said shares are held, to the whole amount of the "capital stock of the said bank or banking association.

"And provided further that nothing herein contained shall "be held or construed to exempt from taxation the real "estate held or owned by any such bank or banking associa- "tion; but the same shall be subject to State, county, "municipal and other taxation to the same extent and rate, "and in the same manner as other real estate is taxed.

"SEC. 2. Every individual banker doing banking business "under the laws of this State is hereby required to declare "upon oath before the assessor, to the amount of capital "invested in such banking business, and each one hundred "dollars of such capital for the purpose of this act, and for "the purpose of taxation shall be held and regarded as one "individual share in such banking business, and such shares "are hereby declared to be personal property. If such "banker have partners, he shall declare upon oath before "the assessor the number of shares held by each of them "in such banking business, ascertained as above provided, "and the shares so held by any partner shall be included in "the valuation of his taxable property in the assessment of "all taxes levied in the town, school district or ward where "such individual banker is located, and not elsewhere. And "such individual banker shall pay the same, and make the "amount so paid a charge in his accounts with such partners; "and if such individual banker have no partners, he shall be "held to be sole owner of all the shares in such business of "banking, and the same shall be included in the valuation "of his personal property in the assessment of all taxes "levied in the town, school district or ward where his bank "is located, and not elsewhere.

"SEC. 3. There shall be kept at all times, in the office where "the business of such bank or banking association organ- "ized under the authority of this State or of the United "States shall be transacted, a full and correct list of the "names and residences of all the stockholders therein, and "of the number of shares held by each; and such list shall

"be subject to the inspection of the officers authorized to "assess taxes during the business hours of each day in which "business may be legally transacted.

"SEC. 4. Sections ten and eleven of chapter ninety-seven "of the Session Laws of eighteen hundred and sixty five "are hereby repealed.

"SEC. 5. When the owner of stock in any bank or bank- "ing association organized under the laws of this State or "of the United States, shall not reside in the same place "where the bank or banking association is located, the col- "lector and county treasurer shall respectively have the "same power, as to collecting the tax to be assessed by this "act, as they have by statute when the person assessed has "removed from the town, ward or county in which the "assessment was made; and the county treasurer, receiver "of taxes or other officer authorized to receive said tax from "the collector, may, all or either of them, have an action "to collect the tax from the avails of the sale of his shares "of stock, and the tax on the share or shares of said stock "shall be and remain a lien thereon till the payment of said "tax.

"SEC. 6. For the purpose of collecting such taxes, and in "addition to any other law of this State not in conflict with "the Constitution of the United States relative to the impo- "sition of taxes, it shall be the duty of every such bank or "banking association and the managing officer or officers "thereof, to retain so much of any dividend or dividends "belonging to such stockholder as shall be necessary to pay "any taxes assessed in pursuance of this act, until it shall "be made to appear to such officer that such taxes have "been paid.

"SEC. 7. The privileges and franchises granted by the "legislature of this State to savings banks or institutions "for savings, are hereby declared to be personal property, "and liable to taxation as such, in the town or ward where "they are located, to an amount not exceeding the gross "sum of their surplus earned, and in the possession of said

"banks or institutions; and the officers of such institutions "or banks may be examined on oath by assessors, as to the "amount of such surplus; and the property of such banks "and institutions shall be liable to seizure and sale for the "payment of all taxes assessed upon them for said privileges "and franchises.

"SEC. 8. This act shall take effect immediately."

"B."

(EXTRACT FROM UNITED STATES REVISED STATUTES.)

SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.

"C."

CHAP. 86.

AN ACT to provide for the assessment and collection of taxes in the city of Albany.

PASSED March 23, 1850.

(Laws of 1850, page 125.)

* * * * * * * * *

ARTICLE SECOND.

OF THE MANNER IN WHICH ASSESSMENTS ARE TO BE MADE, AND THE DUTIES OF THE ASSESSORS.

SECTION 5. Between the third Tuesday of April and the first day of September in every year, the Board of Assessors of the city of Albany shall ascertain by diligent inquiry the names of all the taxable inhabitants in the several wards of the said city, and also all the taxable property, real or personal, within the same.

SEC. 6. They shall prepare an assessment roll for each of the wards in the said city, in which they shall set down in separate columns, and according to the best information in their power:

1. In the first column the names of all the said taxable inhabitants of the ward, and also the names of all other persons having real estate belonging to them in the ward.

2. In the second column, and opposite the name of each such inhabitant or person, a brief and proper description, with the dimensions and boundaries of the real estate in the ward belonging to such inhabitant or person; and also in the same column a similar description of the real estate in the ward, the owner of the freehold of which is unknown, or cannot be ascertained; the property so to be described shall be that only which is defined to be real estate by the general laws of this State relating to the assessment and collection of taxes.

3. In the third column, and opposite the description of each parcel of real estate, the full value of such real estate.

4. In the fourth column, and opposite the name of each inhabitant of the ward, the full value of all the taxable personal property owned by such inhabitant, after deducting the just debts owing by him, and his property invested in any stock of any corporation or association liable to be taxed for such stock as capital or otherwise.

* * * * * * * * *

SEC. 9. If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit; or that the value of the personal estate owned by him after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit and no more.

The provisions of this section shall apply to any trustee, guardian, executor or administrator in their representative character.

SEC. 10. All real and personal estate liable to taxation, the value of which shall not have been specified by the affidavit of the person assessed, shall be estimated by the board of assessors at its full value, as they would appraise the same in the payment of a just debt due from a solvent debtor.

SEC. 11. The corporations or associations liable to taxation, whose principal office or place of transacting the financial business of such company is situated in the city of Albany, shall make the same returns to the board of assessors aforesaid, or one of them, within the same time and subject to the same penalties for neglect, as prescribed in the general laws of the State in respect to returns by such corporations to assessors of towns and wards; and in case of neglect to make such return the said assessors shall nevertheless proceed to assess the said corporations according to

the best information in their power, in the same manner as if such returns had been fully made; but neither such assessment nor the payment of any tax pursuant thereto shall exonerate such defaulting corporation or association from the penalty incurred by neglecting to make any such return.

"D."

[Extract from 1 Revised Statutes of New York, marginal paging, 387; same provisions, 1 Revised Statutes, 931 (6th ed., Banks & Brothers), Chapter XIII.]

TITLE I.

Of the property liable to taxation.

Sec. 1. All lands and all personal estate within this State, whether owned by individuals or by corporations shall be liable to taxation, subject to the exemptions hereinafter specified.

* * * * * * *

Sec. 3. The terms "personal estate," and "personal property," whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks, and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

Sec. 4. The following property shall be exempt from taxation:

1. All property, real or personal, exempted from taxation by the Constitution of this State, or under the Constitution of the United States.

* * * * * * *

7. The personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter.

* * * * * * *

SEC. 7. The owner or holder of stock in any incorporated company liable to taxation on its capital, shall not be taxed as an individual, for such stock.

TITLE II.

ARTICLE FIRST.

OF THE PLACE IN WHICH PROPERTY IS TO BE ASSESSED.

* * * * * * *

SEC. 5. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession, or under his control as agent, trustee, guardian, executor or administrator; and in no case shall property so held under either of those trusts be assessed against any other person.

* * * * * * *

SEC. 6. The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; or if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on.

* * * * * * *

ARTICLE SECOND.

OF THE MANNER IN WHICH ASSESSMENTS ARE TO BE MADE, AND THE DUTIES OF THE ASSESSORS.

SEC. 8. Between the first days of May and July in each year they shall proceed to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property, real or personal, within the same.

SEC. 9. They shall prepare an assessment roll, in which they shall set down, in four separate columns, and according to the best information in their power:

1. In the first column, the names of all the taxable inhabitants, in the town or ward, as the case may be.

2. In the second column, the quantity of land to be taxed to each person.

3. In the third column, the full value of such land, according to the definition of the term land, as given in the first title of this chapter.

4. In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him.

* * * * * * * * *

[1 REVISED STATUTES, HH. BANKS & BROS. 6TH ED., VOL. 1, PAGE 979.]

TITLE IV.

REGULATIONS CONCERNING THE ASSESSMENT OF TAXES ON INCORPORATED COMPANIES AND THE COMMUTATION OR COLLECTION THEREOF.

SEC. 1. All moneyed or stock corporations deriving an income or profit from their capital or otherwise shall be liable to taxation on their capital, in the manner hereinafter prescribed.

SEC. 2. The president, cashier, secretary, treasurer or other proper officer of every such incorporated company shall, on or before the first day of July each year, make and deliver to the assessors, or one of them, of the town or ward in which such company is liable to be taxed, according to the provisions of the sixth section of the second title of this chapter, a written statement, specifying:

1. The real estate, if any, owned by such company, the towns or ward in which the same is situated, and the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate,

and the amount of such capital stock held by the State, and by any incorporated, literary or charitable institutions; and

3. The town or ward in which the principal office or place of transacting the financial business of such company is situated; or, if there be no such principal office, the town or ward in which its operations are carried on, or in which it is liable to be taxed, under the provisions of this chapter.

Sec. 3. The president or other proper officer of every such company, shall also deliver to the comptroller, on or before the first day of July in each year, a written statement, containing the same matters required by the foregoing section, to be specified in the statement to be delivered to the assessors. The statements required by this and the preceding section of this title shall be certified under the oath of the said president or other proper officer, to be in all respects just and true.

Sec. 4. If the statements above required, or either of them, shall not be furnished by any company to the assessors and to the comptroller within thirty days after the time above provided, the company neglecting to furnish such statements, or either of them, shall forfeit to the people of this State, for each statement omitted to be furnished, the sum of $250; and it shall be the duty of the comptroller to furnish the attorney general with an account of all companies that shall neglect to render such lists, that he may prosecute for the penalties hereby imposed.

Sec. 5. If any company that shall be prosecuted for any such penalty, shall pay the cost of prosecution and furnish the statement required, the comptroller, if he shall be satisfied that the omission was not willful, may, in his discretion, discontinue such suit.

Sec. 6. The assessors shall enter all incorporated companies from which such statements shall have been received by them, and the property of such companies and the property of all other incorporated companies liable to taxation in their respective towns, in their assessment rolls, in the following manner:

1. They shall insert in the first column of their assessment rolls the name of each incorporated company in their respective towns or wards liable to taxation on its capital or otherwise, and under its name they shall specify the amount of its capital stock paid in and secured to be paid in, the amount paid by such company for real estate then belonging to such company, wherever the same may be situated, the amount of all surplus profits or reserved funds exceeding ten per cent of their capital, after deducting therefrom the said amount of said real estate and the amount of its stock, if any, belonging to the State, and to incorporated literary and charitable institutions.

2. In the second column they shall enter the quantity of real estate owned by such company, and situated within their town or ward; and in the third column the actual value thereof estimated as in other cases.

3. In the fourth column they shall enter the amount of the capital stock of every incorporated company paid in and secured to be paid in, and of all such surplus profits or reserved funds as aforesaid, after deducting the sums paid out for all the real estate of such company, wherever the same may be situated and then belonging to it, and the amount of stock, if any, belonging to the people of this State, and to incorporated literary and charitable institutions.

* * * * * * *

The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county. [Chapter 456, Laws 1857.]

"E."

[Extract from Statute of New York of 1865.]

Chapter 97.

An Act enabling the banks of this State to become associations for the purpose of banking under the laws of the United States.

Passed March 9, 1865.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * *

Sec. 10. All the shares in any of the said banking associations organized under this act or the act of Congress mentioned in section one of this act, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State; provided that the tax so imposed upon such shares shall not exceed the par value thereof, and provided further that the real estate of such associations shall be subject to State, county or municipal taxes to the same extent, according to the value, as other real estate is taxed.

"F."

[Extract from Act of Congress, 1864.]

Chapter 106.

An Act to provide a National currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof.

* * * * * * * *

Sec. 41. * * * * * * * *

Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate, from being included in the

valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; provided, further, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located; provided, also, that nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes to the same extent, according to its value, as other real estate is taxed.

"G."

[Extract from New York Statute of 1880, in Relation to the Taxation of Bank Shares.]

Chapter 596.

An Act to provide for the taxation of banks and of moneyed capital engaged in the business of banking and receiving deposits or otherwise.

Passed June 26, 1880.

* * * * * * *

Section 3. The stockholders in every bank, banking association or trust company organized under the authority of this State or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank, banking association or trust company is located, and not elsewhere, whether the said stockholder reside in said place, city, town or ward or not; but in the assessment of said shares each stockholder shall be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State,

and the assessment or taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank, banking association or trust company, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank, banking association or trust company; nothing herein contained shall be held or construed to exempt the real estate of banks, banking associations or trust companies from either State, county or municipal taxes; but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner, according to its value, as other real estate is taxed.

SEC. 4. There shall be kept at all times in the office where the business of each bank, banking association or trust company, organized under the authority of this State, or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and of the number of shares held by each; and such list shall be subject to the inspection of the officers authorized to assess taxes, during the business hours of each day in which business may be legally transacted.

The managers or agents of any corporation, company or joint-stock association mentioned in the first section of this act, shall keep at all times in the office where the business of such corporation, company or joint-stock association is transacted in this State, a full and accurate account of the moneys used or employed, and of the deposits therein; and such account shall be subject to the inspection of the Comptroller or of any clerk designated by him to inspect the same during business hours of any day on which business may be legally transacted.

SEC. 5. When the owner of stock in any bank, banking association or trust company, organized under the laws of

this State, or of the United States, shall not reside in the same place where the bank, banking association or trust company is located, the collector and county treasurer shall, respectively, have the same powers as to collecting the tax to be assessed by this act as they have by law when the person assessed has removed from the town, ward or county in which the assessment was made, and the county treasurer, receiver of taxes, or other officer authorized to receive such tax from the collector, may all or either of them have an action to collect the tax from the avails of the sale of his shares of stock, and the tax on the share or shares of said stock shall be and remain a lien thereon from the day when the property is by law assessed, till the payment of said tax, and if transferred after such day, the transfer shall be subject to such lien.

SEC. 6. For the purpose of collecting the taxes to be assessed under sections three, four and five of this act, and in addition to any other law of this State, not in conflict with the Constitution of the United States, relative to the imposition of assessment and collection of taxes, it shall be the duty of every such bank, banking association, or trust company, and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of sections three, four and five of this act until it shall be made to appear to such officer or officers that such taxes have been paid.

SEC. 7. This act shall take effect immediately.

UNITED STATES SUPREME COURT.

CHARLES A. HILLS, Receiver of Taxes, &c., et al.,
Appellants,
vs.
THE NATIONAL ALBANY EXCHANGE BANK,
Appellee.
No. 817.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,
Plaintiffs in Error,
vs.
EDWARD N. STANLEY,
Defendant in Error.
No. 847.

ADDITIONAL BRIEF FOR APPELLANTS AND PLAINTIFFS IN ERROR.

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IN THE SUPREME COURT OF THE UNITED STATES.

CHARLES A. HILLS, RECEIVER OF TAXES, &C., ET AL.,
Appellants,

AGAINST

No. 817.

THE NATIONAL ALBANY EXCHANGE BANK,
Appellee.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,
Plff's in Error,

AGAINST

No. 847.

EDWARD N. STANLEY,
Def't in Error.

Additional Brief for Appellant and Plaintiff in Error.

Prior to the adoption of the National Banking system the whole banking capital of the country invested in State Banks or in the hands of individual bankers was subject to State taxation.

In the older and more wealthy States banking capital was a very large item in the list of the taxable property in the State.

The adoption of the national banking system and the feature thereof, taxing State banks out of existence so far as the issue of circulating notes is concerned, would have effectually withdrawn from the sphere of State taxation the whole banking

capital of the country but for the fact that Congress, conscious of the inequity of such result, expressly provided that nothing contained in the Act should prevent the shares in national banks being taxed, subject to the two restrictions named.

The tax law of the States was then inartificial, incongruous and in many cases obscure.

The legislation consequent upon the Act of Congress in respect to the National banks was of the patch coat style usually adopted in English-speaking communities.

No general act covering the subject of taxation, and of which the restrictions stipulated for by Congress should form a part, was adopted. There is, perhaps, little evidence of the employment of any expert to see that the legislation consequent upon the Act of Congress was in harmony therewith, and with the existing State general tax law.

There was, however, at least in the State of New York, an undeniably honest effort to accept the National legislation and to conform her tax law to its requirements.

That her effort was not at first completely successful is not matter of surprise; it, however, is to be remarked that in every case the failure has been due not to lack of purpose but to lack of skill in fitting the new principles into the framework of the old law.

In the case of Van Allen, in 3 Wallace, 581, the omission in the State enabling act of the restriction in the Federal statute that the rate of tax on shares in National banks should not exceed the rate on shares in State banks was clearly due to the idea that its insertion was unnecessary, because under the then New York law no tax was imposed on *shares* in State banks but a tax was imposed on the capital of State banks at its actual value, and the rate was in all cases the same.

In the case of People vs. Weaver, 100 U. S., the New York statute is a transcript of the Federal statute; but because of a misapprehension and misconception and consequent misconstruction of such State statute by the State Court in fitting the same into the pre-existing body of State tax law it was found that a right of the relator protected by the Federal statute had been infringed.

These matters are referred to in order to call attention to the delicacy of the questions involved in this case.

The vast amount of property which may be withdrawn from

or remain subject to taxation was, in 1865, as stated in the Van Allen case, p. 579, over $115,000,000. It is now nearer five times that. The tax for 1880 in the city of New York alone was over a million and a half of dollars.

The amount directly depending on the decision in these cases is enormous. Not alone the tax of 1879, but for the six prior years is at risk, because if the tax law is held *void*, all taxes paid for six years prior may be recovered back under the Cases of 43 New York, 188, and 53 New York, 49. These taxes for the City of New York alone would amount to over ten millions of dollars.

The State desires to retain these taxes and it heartily desires to place its tax laws in harmony with those of the United States, and with the views expressed by this Court.

We respectfully submit that this Court should recognize that purpose and effort, and that while it should see that rights protected by federal principles as enunciated by this Court are strictly and fully protected, it should be careful to take no step unnecessary for the protection of such rights but should rather do all that it can to harmonize and render effectual the Federal and State tax law.

These remarks seem pertinent because of the extraordinary character of the claim of appellee and defendant in error in these suits.

That claim is that a State Statute in totidem verbis, as the Federal Statute, is void because in conflict with the Federal Statute.

The basis stated for this most extraordinary claim is that another and long pre-existing State statute providing for the deduction of indebtedness in assessing the value of personal property has been decided by the New York Court of Appeals not to apply to the State statute under consideration.

That thereby a higher rate has been assessed on shares in National banks where the holders thereof are indebted, than on other moneyed capital where its owner was indebted, *ergo* the *State Statute* of later date, which says that shares in National Banks shall *not be* assessed at a greater rate than other money capital is void. *ergo* shareholders who are *not* indebted, as to whom no federal right has been infringed, should be relieved from all taxation; *ergo*, five hundred millions of taxable property shall go free, and the rest pay all the taxes.

Upon this proposition we submit the following points:

First. The question cannot be raised by any person other than one who is indebted and is entitled to have his indebtedness deducted.

Only such a person *can* be injured as to him only is the federal privilege denied.

The tax assessed and levied is a tax on shares and on the individual shareholder. If he asks relief he must show injury *to himself*, not to others.

As to all shareholders not indebted this bill is the same as if filed by such shareholders *individually*, without an allegation that they were indebted, and thus without showing any wrong done them.

Suppose that, by reason of some confusion in the prior law the State Courts had held that a non resident was lawfully taxed as to his shares in some district other than that in which the bank was located!

On the theory of appellee that fact would relieve all shareholders in all National banks from the payment of any tax and would give to any resident and *unlajured* shareholder a right to file a bill to enjoin the collection of the tax.

The case supposed for illustration has been decided by this Court in Austin vs. The Aldermen, 7 Wallace, 694.

The two cases are precisely the same only the illustration exhibits the claim a little more boldly.

Courts have never granted relief to a person so situated.

In the many cases where this Court has held statutes, Federal or State, to be unconstitutional, not one can be found on the application of a person not directly injured by the act complained of.

The case of Spooner vs. McConnell (1 McLean, 337), is analogous. Complainant was a riparian proprietor on a navigable river above a fall. The defendants, in constructing a canal, were about to build a dam across the river, thus obstructing navigation. Complainant applied for an injunction, alleging that he was a citizen of the United States and had a right to navigate the river, and that the dam would be an obstruction.

The Court said that it did not sit to determine abstract right but concrete cases. That it not appearing that plaintiff was engaged in navigation his abstract right to engage in navigation if he chose was not sufficient to enable him to file a bill for relief.

Tiernan vs. Riker, 102 U. S., 123, is also analogous, and in Williams vs. Hagood, 98 U. S., 72, this Court expressed similar views.

Suppose this bill had contained no allegation that a single shareholder was indebted, suppose even that it affirmatively appeared that not one shareholder in any National bank was indebted. Would this Court entertain such a bill?

This illustration may seem extreme, but it is not.

In the City of New York, after the decision of this Court in People vs. Weaver, the Tax Commissioners gave the most public notice to all shareholders in National banks that deductions for indebtedness would be allowed.

The tax amounted to over a million and a half dollars.

A number of shareholders applied, and reductions to the amount of $1,822,861.91 were made. It left a balance of about fifty millions.

This shows how small a proportion of the shareholders could or would avail themselves of the privilege claimed. Yet every one of the banks to whose shareholders the privilege was thus offered have now obtained injunctions against the collection of the tax, grounded on the authority of the action of the Court below in the cases at bar.

In the tax cases heretofore before this Court the parties complaining, have shown a direct injury.

In Van Allen's case, 3d Wallace, the allegation was that shares in State banks were *not taxed at all*. Of course that fact injured every shareholder in a National bank.

In People vs. Weaver, 100 U. S., the relator showed that he was indebted, and that his application to reduce his indebtedness had been refused.

Now, for the first time it is claimed, that a man not indebted and suffering no injury, is not liable to taxation, because some one else has been wronged.

Even as to the few stockholders shown to have been indebted, the appellee makes no case.

Under the Austin case the decree is erroneous, and must be reversed as to all stockholders not shown to have been indebted.

As to the few who testified that they were indebted, and would have claimed deduction if they had thought it would be allowed, it is plain that they entertained the then existing view of the law.

They did not claim *deduction*. They acquiesced in the view which they say the State authorities entertained.

There can be no such thing as a wrong to them while they were assenting to or at least not objecting to the very thing of which they now complain—see Record, p. 27 *et seq.*

Nor can appellee help his case by claiming that what results the Act of 1866 *may* produce, not what it has produced, is the material question.

Even then the question is what results may or can the Act of 1866 produce to one who *is not* indebted! Can it hurt him?

Second. The bill is also defective in that it alleges, and the proof shows, no tender of the amount fairly due by persons who claim to have been indebted.

If such persons have sustained any wrong, it is in being assessed too high by the indebtedness they were entitled to have deducted.

That in such case they are entitled to relief only upon payment or tender of the proper sum is a familiar principle of equity which has repeatedly been recognized by this Court.

Pelton vs. National Bank, 101 U. S., 143.
Cummings vs. National Bank, 101 U. S., 153.
National Bank vs. Kimball, 103 U. S., 732.

The same effort "to evade this rule" which was made in Bank vs. Kimball is made here.

Nor did this Court in People vs. Weaver make even an apparent exception to this rule as is suggested in Bank vs. Kimball, p. 735. In People vs. Weaver, 100 U. S., 539, the relator showed by affidavit that if the deduction were allowed he had no personal property, *i. e.*, not to exceed "one dollar." Of course there was in such case no tender to be made and the point was not made or claimed.

Third. The "attempts to evade this rule" by claiming *all* taxation on National banks, under the New York law, to be void are no more entitled to success in these cases than in the Kimball case.

Appellees seem to treat this case as if the Act of Congress were a direct grant of power to the State, and that the State was bound to pass an Act which should be the execution of the power, and that if the State Act, in itself, failed to be a complete and perfect execution of such power, it is *wholly* void.

To sustain this theory they seize upon some words in the opinion of this Court in People vs. Weaver, p. 543, "as Congress was conferring a power on the States," &c.

Those words were not said in relation to this question, and this question was not before the Court.

Such a position would seem to ignore the familiar principle that under the Constitution Federal laws do not act on the States, but directly on the people.

The true relation of the Act of Congress to State legislation on this subject is well expressed by this Court in the Van Allen Case, 3 Wallace, p. 585.

"It is said that Congress possesses no power to confer upon the State authority to be exercised which has been exclusively delegated to that body by the Constitution, and consequently *that it cannot confer upon a State the sovereign right of taxation;* nor is a State competent to receive a grant of any such power from Congress. *We agree to this.* But as it respects a subject matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress by reason of its paramount authority may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the Federal and State Governments is found in the Pilot Laws of the States and the Health and Quarantine Laws. The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this Court is a concurrent power.

The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the general government."

On page 583 this Court shows that the National Banking Act contained no grant of power to the States to tax shares in the National bank, *but conferred certain franchises upon the National Banks upon the condition* that the shares should not be exempt from State taxation.

By the well settled doctrines of this Court, all sovereign

powers are granted by the Constitution either to the United States or to the States respectively. The rule for locating any special power is that federal powers must be found specifically granted or necessary and proper for the execution of specifically granted powers; and that all other powers, unless specifically prohibited, are lodged in the States.

There is no territorial division of sovereignty. Every citizen is subject to laws prescribed by two separate political corporations each acting directly on him, each prescribing to him a rule of action on the special subject over which it has jurisdiction. Neither of these political corporations can prescribe any rule or law *to the other*, unless in the single case of a judicial controversy to which a State is a party; though in some few cases like the enactment of tonnage laws by the States with the consent of Congress *joint action* is necessary. Both act harmoniously upon a common field.

Judicial power is divided between the Federal and State Governments in the same way as legislative. It is not territorial, and is not coextensive with the divisions of legislative power. It acts on the persons before the Court, and administers *all* the law, whether Federal or State, which affects the questions before it. Federal Courts administer State law and State Courts Federal law. "The law is the same by whatever Court administered."

In Shelby vs. Guy, 11 Wheaton, 367, this Court says: "Yet that course is necessarily indicated by the duty imposed on us to administer, as between certain individuals the laws of the respective States, according to the best lights we possess of what those laws are."

In Suydam vs. Williamson, 24 Howard, 434, this Court says: "Upon cases like the present" (error to the U. S. Circuit Court in New York) "the relation of the Courts of the United States to a State *is the same* as that of her own tribunals. They administer the law of the State, and to fulfill that duty they must find them *as they exist in the habits of the people* and in the exposition of their constituted authorities." And this Court has expressed the same views in Davidson vs. New Orleans, 96 U. S., 105, 106.

There is thus no grant of power by Congress to the States. Congress is incompetent to grant, the States incompetent to accept.

There is a body of law on the subject of taxing shares in National banks, part of which is State law part of which is National law each in its respective sphere.

The part of the law which is Federal can only be invoked by one having a Federal right which he claims is infringed.

The State Courts are bound to give him relief quite as much as the Federal Courts.

As to one not having that Federal right, the whole law which governs the subject is the State law.

Take now the case of a non-indebted shareholder.

He has capital. It is liable to State taxation. He invests it in National bank shares. It remains so liable to taxation.

He has a Federal right that his capital so invested shall not be taxed at a greater rate than moneyed capital in the hands of individuals. It is not. How then can he without wrong complain?

Even if it resulted that there was an inequality among National bank shareholders, that would not be a Federal question. There is no United States law or principle requiring equality in the taxation of shareholders in banks.

Inequality in the administration of tax laws always has and always will occur, and neither Legislature has hitherto undertaken to provide or Courts to compel a system which is perfectly equal. The idea is chimerical.

We, therefore, submit that there is nothing in the present case to relieve the parties from the burden of showing some injury to themselves, and of making payment or *tender* of the proper sum before they can invoke the aid of a Court of Equity.

Fourth. The Court below erred in holding that a National bank shareholder was not entitled to deduction, and in following the overruled case of People vs. Dolan.

The source of all difficulty in the prior tax litigations has been that they were carried on partly in State and partly in Federal Courts. They began in the State Courts and went by writ of error to this Court.

The cases raised questions of State and Federal law. Neither Court was final and conclusive upon all the law of the case—the State Court because the constitution makes this Court final on Federal questions; this Court because on error to a *State* Court only Federal questions are brought before this Court.

The consequence was unfortunate.

The State Court intended to decide the Federal questions in accord with the doctrines of this Court, and supposed that it had.

This Court, taking a different view of the Federal law, was unable on such a writ of error to declare what, under the new condition of a different view of the Federal law, was the State law.

It could only reverse the judgment and remand the cause to the State Court "for further proceedings in conformity to this opinion."

It was perfectly competent for the State Court then to have reheard the case and to have answered the first question in the affirmative, and the second in the negative.

The defendant had no interest in further proceedings, as the relator had no property subject to tax (100 U. S., p. 540), so probably none were taken.

Had there been, there can be no question but that the State Court would have taken the course indicated.

In Douglass vs. County of Pike, 101 U. S., p. 687, says this Court:

"We recognize fully not only the right of a State Court, *but its duty*, to change its decisions whenever, in its judgment, the necessity arises. It may do this *for new reasons*, or because of a change of opinion in respect to old ones."

Can there be any doubt that had "further proceedings" been taken in the Weaver case the New York Court of Appeals would have changed its opinion as to the State law for the "new reason" that its old opinion brought the State law in conflict with the Federal law?

Its *duty was* to change its opinion not to have done so would have been sheer stubbornness and obstinacy, and is hardly a thinkable proposition.

In Hintermister vs. Bank, 64 N. Y., 212, the Court of Appeals did change its opinion in a precisely analogous case.

In that case Allen, J., said: "The Supreme Court of the United States having given an interpretation to the Act of Congress regulating the interest which may be lawfully taken by National banks, and declaring the penalties for demanding or receiving interest at a greater rate than that allowed by law, adverse to the views of this Court, as expressed in The National

Bank of Whitehall vs. Lamb (60 N. Y., 95), neither that case nor that of The Farmers' Bank of Fayetteville vs. Hale (59 N. Y., 53) can be longer considered as furnishing a rule for decision in cases within the principle of the adjudication by the Federal Court. The decisions of that Court, in all matters of Federal jurisprudence, and of the interpretation of the Acts of Congress, are paramount to and binding upon all other Courts.

The judgment in The Farmers' Bank of Fayetteville vs. Hale, was a necessary sequence of that in the case of Lamb, the statute of the State being in all respects a transcript of the Act of Congress, and both received the same interpretation. But by the authoritative decision of the Court at Washington, the Act of Congress receiving a different interpretation from that which we thought it would bear, it follows that in order to give effect to the evident intention of the Legislature of this State, the statute enacted in 1870, to put the State banks upon an equality with the National Banks, should have the same interpretation and effect as is given to the Act of Congress. Any other interpretation would do violence to the clearly expressed will of the Legislature, do injustice to the State institutions, and give undue effect to the legislation of Congress, so far as it is hostile to the State banks. *Both cases may, therefore, be regarded as overruled.*"

Now in the case at bar the very thing which the Court below says it could not do (Record, p. 47, fol. 179), it was its duty to do.

As we have seen in the cases before cited this Court holds that the United States Circuit Courts sit in the several States to administer the laws of those States.

In the effort to ascertain what those laws are, they are not bound servilely to adhere to any special decision that may have been pronounced by a State Court, but they are bound, and it is their duty to look to all those sources of information which would be open to the State Court were the question then presented to it.

Guided by such principles and freed from by the narrow notion of its duties which controlled the Court below, such Court must have held that the State law allowed a reduction for debt and consequently would have awarded judgment for the defendant unless in cases where such reduction had been refused.

This Court now sits in the same relation to the State law that the Court below did. It is bound to administer the State law as it now finds it, and it is bound to ascertain that law by all the means and from an investigation of all the sources which would be open to a State tribunal.

Let us now see what is the precise question.

Our opponents claim, and the Court below has held, that the words in the State Act of 1866, "the value of" provided for a rule of taxation by which no deduction is allowed for existing debts. The claim is based, substantially, wholly upon the decision of the Court of Appeals in The People vs. Dolan and in The People vs. Weaver. It is also urged, with some degree of confidence, that such is the proper construction of the Act.

Upon this claim we make three points:

First. The Act itself, aside from authority, will bear no such construction. Such a construction is opposed to its plain and direct terms.

Second. That the decision of People vs. Dolan contains, in itself, so clear a misapprehension and misconception of the existing statute law of the State of New York, that upon such a misconception and misapprehension being pointed out the decision is no more authority than it would be had the Court by inadvertence overlooked a statute in clear and express terms conflicting with the decision.

Third. That assuming that the decision in People vs. Dolan would otherwise be followed, since the decision of this Court in People vs. Weaver, People vs. Dolan is no longer authority, and no longer states the law of the State of New York.

As to the first point: If the Court will look at the Tax Law of the State of New York, a copy of which is contained in the appendix to our principal brief, page 48, under the head of Title I., they will find that, by express terms, all lands and all personal estate, whether owned by individuals or corporations, are and were liable to taxation. They will find that in the terms "personal estate" were included public stocks and stocks in moneyed corporations, and that shares or stocks in moneyed corporations were taxable to individuals as such in all cases except those mentioned in Section 7, on page 49, which provided that the owner or holder of stock in any incorporated company liable to taxation on its capital should not be taxed as an individual for such stock.

Title 4, on page 50 of the brief in section 1, provides that all moneyed or stock corporations, deriving an income or profit from their capital or otherwise, should be liable to taxation on their capital in the manner thereinafter prescribed.

Now, if the Court will look at section 9, on p. 50, in subdivision 4, they will find the provision that the assessor should set down for taxation against individuals the full value of all the taxable personal property owned by such persons after deducting the just debts owing by him.

It is hardly necessary to call the attention of the Court to the fact that it is thus directly and expressly provided that, as to shares of corporations not taxed on their capital, an individual owning them shall be taxed, but that against their value, as well as against the value of any other personal property owned by him, there shall be deducted debts owing by him.

Now, it is true that taxes levied upon the capital of corporations were levied without regard to the indebtedness of such corporations and also without regard to the increased value of the capital by reason of accumulated surplus. The law taxed the capital of corporations at its par value; it did not take into consideration that such value might be diminished by reason of indebtedness or increased by reason of accumulations. The Legislature assumed that such corporations, under the provisions of law for winding up insolvent and crippled corporations, would not continue in business with impaired capital, and that in case of accumulation, under the provisions for increase of capital, the capital would be increased.

In the year 1857, however, perhaps also in 1853 (but it is not necessary to go back of 1857), the Legislature distinctly provided for taxing the capital of corporations upon its actual value instead of its nominal value, and in that way practically provided for an allowance on account of indebtedness and for an increase in case of surplus.

The language of Judge Denio, in the case of Oswego Starch Factory vs. Dalloway, 21 N. Y., 459, is pertinent. Says the Judge:

"There is, doubtless, an incongruity in including the accu-
" mulated profits above ten per cent. in the assessment where
" the capital is assessed at its market value. It does not seem
" to have occurred to the law-makers that the existence of a
" surplus enters into the market value of the stock, and that

" this surplus is never the subject of an ownership or disposition " distinct from the stock, and that their whole object was ac- " complished when they directed the stock to be assessed at its " actual value."

The Court will find the Act of 1857 referred to on the principal brief, at the bottom of page 52.

In respect to the allowance of debts, in order to ascertain this actual value referred to in the statute, it was held in the case of People vs. Ins. Co., 38 N. Y., p. 89, that in order to ascertain such actual value it was necessary not only to allow or deduct debts, but to make some allowance for even contingent liabilities.

We thus find that the statute law of the State of New York, applicable to taxation, which existed at the time of the decision in the Dolan case, and which exists to-day, provides and provided, in express terms, for two systems of taxation in respect to the property owned by corporations. One of them was, not to tax the corporation upon its capital, but to tax the individual shareholder or stockholder in such corporation. In such case, by the express terms of the statute, the stock was valued in the list of personal property and from it a deduction was made for his debts. The other was, not to tax the shareholder for his share, in cases where the capital of the corporation was itself taxed, but in such cases an allowance was made for the indebtedness of the corporation by the provision that the capital should be assessed at its actual value.

When the Act of Congress in respect to the National Banks was passed, the State Banks in the State of New York were taxed upon their capital. No shareholder therein was taxed in respect to such shares. The State law intending to conform itself to the Act of Congress, provided for taxing the shares of National banks, and the idea of the State was that such provision was sufficient because taxation upon the capital of State banks was the precise politico-economical equivalent (they being taxed upon their actual value) of a taxation upon shares in the National banks. Perhaps, too, such would have been the effect of such legislation in the view of this Court as well as in that of the State Court, had it not been for the fact that capital of the State banks might be invested in United States securities, and in that way be exempt, while such investment, in National banks, would not produce such

exemption to the shareholder. At all events, the action of the State Legislature upon that Act, as to National banks, was simply to put the method of taxing them in the system already provided for taxing individuals upon shares, and not to put them in the system already provided for taxing corporations upon their capital. So far as State law was concerned, or the State policy was concerned, either alternative was sufficient, but the Federal law confined the statute in its action as to National banks, to putting them in the system provided for taxing shares instead of that provided for taxing capital. The subsequent provision in the Revised Statutes of the United States (*vide* p. 15 of old brief), and the subsequent law of the State of New York (*vide* p. 42 of old brief), all accomplished the same result. The Federal law requires the taxation to be upon shares. The State law provides for the taxing of National banks by taxes levied on their shares instead of being levied on their capital. And when the State law put National banks, for taxation, in the one of the two systems adopted by the State which provided for taxation of shares instead of taxation of capital, all the consequences and all the rights, and all the privileges provided for shareholders in any other corporations applied equally to shareholders in National banks, for purposes of taxation.

Our opponents object that the right of assessors to assess for personal property, under Section 9 of the General Act, p. 56, and in the same way under the Special Act, applying to the City of Albany, is limited to the ward where the tax-payer resides, and that there is no provisions in the old law for such assessment in the place where the Bank is located, where such place differs from the residence of the tax-payer. Our answer is, that such objection is an objection to detail of procedure which cannot prevail. Precisely the same kind of objection was considered by the Court of Appeals in the case of Oswego Starch Factory vs. Dalloway, 21 N. Y., p. 461, and above referred to; and the Court says, "That Act, it is true" (referring to the Act of 1857, on page 52 of our brief) "does not go into detail as "to the form of the roll; but if the intent "be clear, as we think it is, to assess the capital "at its real, as distinguished from its nominal value, "the form can easily be accommodated to give effect to the in- "tention. Such a reconciling construction is often required to "be given to remedial and administrative statutes, which are

"sometimes drawn up in haste and without prescribing the man-
"ner in which the directions of the Legislature are to be car-
"ried out." We submit, therefore, that according to the plain affirmative provisions of the statute law of the State of New York, the words in the Act of 1866 providing that the shares in banking associations should be taxed on the value of the shares therein, puts such shares in the category provided by section 9 in the general law, on p. 50 of our brief, which required the full value of taxable property to be set down, and that the taxation of the shares in banks is as much affected as the taxation of any other personal property by the clause which follows at the end of the sentence, to wit: "After deducting the just debts "owing by him."

As to the second point—that these plain provisions were overlooked and misconceived by the Court in People vs. Dolan—we submit the following:

Judge Hunt, on p. 63, uses this language: "We thus see "that for a period of nearly fifty years the policy of the "Legislature in regard to the taxation of bank capital and bank "shares has been uniform. The stock has been taxed at its "nominal value, without deduction for debts or charge for sur-"plus, or, as more recently, at its actual value." Judge Hunt does not seem to perceive that the change made in 1857, to taxing the actual value, changed the whole policy which he says had continued for fifty years. As we have already shown, when you tax upon its actual value you allow a deduction for debts of the banks, because such debts must be taken into consideration in ascertaining such actual value.

Judge Hunt further says, at the bottom of same page: "In "all of these States the assessment and taxation were based "upon the value of the stock of the incorporation. . The debits "and credits and actual fund of the bank established the subject "of taxation, *and the condition or circumstances of the individ-*
"*ual owning the shares did not enter into the account.*"

That paragraph contains the misconception under which the Court clearly was laboring. In taxing the capital of the bank, *why should* the circumstances of the individual shareholder be taken into account? In one sense, they *were* taken into account; for the statute expressly provided that where the capital was taxed the shareholders should not be taxed.

It would seem clear that such circumstances should not be taken into account in taxing the capital, because, inasmuch as the shareholder was *not* taxed on account of shares, he of course could have no right to deduct his debts as against them. The right to deduct debts was to deduct it from the amount of the personal property *taxed*, *not* from the personal property that was *not* taxed. The whole opinion of the learned Justice is based upon and sustained by that clause. Strike it out, and you strike out one of the premises of the syllogism upon which he bases his conclusion. His argument is, that the longtime existing policy of State tax laws did not allow of deduction for debts on account of the condition or circumstances of the individual owning the shares; that the Law of 1866 was intended to conform to such general policy; that consequently the deduction claimed could not be allowed. We have seen that there was no such general policy, and that the learned Justice arrived at the conclusion that there *was* one, only by the singular confusion of thought which could suppose that in the taxation of capital any reference should be had to the debts owing by shareholders when no taxation was made against such shareholders.

Judge Parker, who gave the only other opinion of the Court in that case, labors under the same misconception. He says, on page 70: "The banks had not the right to reduce the value "upon which they were taxable, on account of their indebted- "ness; and there is nothing in the statute under consideration "expressly giving the stockholders such right."

We have seen that by the Statute Law of 1857, existing at that time, the banks did have the right to reduce the valuation on account of their indebtedness, and the valuation was by express terms required to be made according to the actual value of the capital, and not at its nominal value.

Again, on p. 73, near the bottom of the second paragraph, he says that "the words in the Act of 1864, 'shall be assessed and "'taxed on the value' without reduction for debts, as has ever "been the policy of the State in reference to the property which "this is made to represent." As we have seen, no such policy ever existed in the State. It was expressly provided in the State Statute, wherever a shareholder was assessed or taxed for shares, he had the right to have his debts deducted, in order to ascertain the net amount for which he should be taxed. That always was, and is now, the law of the State of New York

wherever an individual is assessed on account of the ownership of shares in any corporation. No case can be suggested where on such account he is not allowed to deduct his debts; and so far as it might be claimed that such a policy had existed in the State of New York in the case where the taxation was levied directly upon the capital, that policy was changed by the Act of 1857, which had been in force ten years when the decision in People vs. Dolan was rendered.

We therefore submit that, aside from any consideration of the effect of the decision of this Court in People vs. Weaver, the case of People vs. Dolan is entitled to no more force as authority than any other case which is demonstrated to have been decided upon a clear misconception of existing law, or even of a case decided in ignorance of an existing statute.

As to the third point: In the case of People vs. Weaver this Court decided that, giving to the State law the construction given in People vs. Dolan, that the shares should be taxed on the value without any deduction for debts, that such statute was then in conflict with that part of Section 5219 of the Revised Statutes of the United States, which provided that State taxation should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

The Court will notice that the Act of the State of New York, of 1864, contains the very identical words found in the U. S. Statutes: "but not at a greater rate than is assessed "upon other monied capital in the hands of individuals of this "State."

Now, we submit, that if those words in the Act of Congress required a deduction for debts in order to make the rate *the same*, the same words in the *State statute* made the same requirement. The words are the same, and although two Courts may give them a different construction, yet the same Court cannot give them one construction in the Act of Congress, and another in the Act of the Legislature.

Applying the construction given by this Court to the Act of Congress to the same Act as passed by the Legislature and we must construe the Act of the Legislature as providing that deductions for debt shall be made in assessing bank shares.

The Act says that *the rate* shall be the same as that assessed on other moneyed capital, &c.

This Court has held that "*rate*" in the Federal statute means the whole process of assessment. This Court must hold *that in the State statute it means the same thing.*

If it does then it means that the whole process applicable to ascertaining the *rate* of other moneyed capital is applicable also to ascertaining the rate of bank shares.

The Court sits now in the construction of the State statute in the "new light" of the construction given by this Court to the Federal statute.

Its relation to the State law is now precisely the same as that of the State Court.

It has "new reasons" for construction not enjoyed by the State Court when it decided the Dolan or the Weaver Case, and, acting with these new lights, we submit that it must hold the same construction for the same words in the State Statute as in the Federal Statute, and that the State law, properly construed, allows deductions for debts.

Fifth. Nor can it be claimed that this construction of the law should obtain only in cases occurring subsequently to the decision of this Court in this case, or subsequently to the decision of the Court of Appeals in some new case that may be submitted to it.

The Case of Douglass vs. Pike County, 101 U. S., 677, holds no such doctrine.

In that case it was held that this Court would not follow the new decision of the State Court because such decision impaired the obligation of a contract.

Here there *is no contract.*

A fair test as to the validity of such argument is to suppose that this case had been brought in the State Court, and that the State Court had construed the statute and declared the law as we claim it to be.

On error to this Court, under the 25th Section of the Judiciary Act, would this Court reverse such judgment on the ground that any Federal right was infringed?

Clearly it could not on the ground stated in Douglass vs. Pike County, for here there is no contract.

It is not perceived what other Federal principle could be invoked.

The maxim of *stare decisis* was never applied to a case like

the present. The assessment of taxes never constituted a rule of property.

Were it applied in a case like this, the many thousand of overruled cases could never have existed. Elasticity would have been wholly wanting in the law. Says Chancellor Kent, 1 Com., 477, "It is probable that the records of many of the Courts in this country are replete with hasty and crude decisions; and such cases ought to be *examined without fear* and *revised without reluctance*, rather than to have the character of our law impaired, and the *beauty and harmony* of the system *destroyed* by the perpetuation of error. Even a series of decisions are not always *conclusive* evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change of it;" see the whole page.

Here the decision asked by appellant and plaintiff in error would affect no rule of property; would operate on no contract; would produce no injustice; would repaire appellee and defendant in error to pay no tax which he ought not to pay; on the contrary, it would put them in the precise condition which they always claimed; give them the rights they always demanded; make them pay just the tax which Congress and this Court says they ought to have paid; gives them the rule of assessment which they claimed, *i. e.*, a deduction for debts; *but it does not allow them to escape their just share of the burden of taxation, and to throw it upon their fellow citizens.*

It is possible that there may be some difficulty in the practical application of the rule laid down in Douglas vs. Pike County.

If this Court would not follow in that case the later decision of the State Court, it follows that the State Court decision was wrong and would have been reversed by this Court on error. How the State Court then could make a new decision it is difficult to see, as every judgment would be reversed in this Court.

It only follows that in that case the decision of the State Court was wrong because it impaired the obligation of a contract.

This Court, in that case, gave to the *decision* of the State Court the same effect as a statute, and it held the decision void.

The rule cannot apply to this case, because this Court has

held that the decision of the Court of Appeals was erroneous, and it surely could not hold a subsequent decision void or erroneous which should accord with the decision of this Court.

Again, if it be urged that the Dolan case, holding against the right to deduct indebtedness, had been settled law for several years, we answer that the Dolan case also held that such denial of the right was not in conflict with the Federal law.

True the case did not come before this Court, but the acquiescence was as general and complete on the one point of the decision as on the other, and the Court of Appeals had complete jurisdiction to declare the Federal law, subject to revision in this Court.

Every one acquiesced until the bringing of the Weaver case, and in that case the relator did not act on the theory now *advanced* by appellee and defendant in error, that *no tax* under the law could be levied on shares in National banks, but on the theory urged by us, that a tax *could be levied*, but that the relator was entitled to a reduction for his debts.

Sixth. There is no force in the objection that the New York Statute of 1866 does not in terms prohibit reduction, and thereby enable this Court to reject such prohibition and give effect to the remainder. As we have already seen there is and can be no fault in the statute itself. Being in the same words with the Federal Statute it cannot *per se* conflict therewith. The vice in the New York law was in the decision of the Court of Appeals. It was that decision, or more properly, the law contained in and enacted by that decision, which conflicted with the Federal Statute; and it was that law *and not the statute* which this Court held void.

This invalidity of a State Court decision, or of the law enacted by a State Court decision, has been frequently held by this Court.

It was so held so early as the case of Shelby vs. Guy, 11th Wheaton, and it was recently emphatically asserted in Douglas vs. County of Pike. That the rejection of the law enacted by that decision leaves a complete and harmonious tax law is admitted by counsel on the other side, when they say, on page 16 of their brief in number 847, that the statute of 1880 permitting a reduction, makes a complete tax law.

There is nothing in that statute of 1880 which was not in the prior law, if we eliminate the decision of the Court of Appeals.

Seventh. It may be worth while to refer to a suggestion by the other side that the Legislature of New York, by the passage of the Act, Chapter 596, passed June 26th, 1880, assumed the invalidity of the law of 1866.

We answer that the first step taken by the Legislature after the decision of this Court in People vs. Weaver, assumed that the effect of such decision was to give to National bank shareholders the right of deduction claimed, and to leave the tax law valid and effectual in all other respects. By Chapter 140 of the Laws of 1880, passed April 21st, it was enacted that the shareholders in State banks should be taxed only as National banks, provided that they should be entitled to reduction for debts only when they had not had such reduction from their assessments on other personal property.

The law in Chapter 596 was passed subsequently, and only for greater caution. A copy of said Chapter 140 is hereto annexed, marked H, and certain opinions of the Attorney-General of New York, marked I and K.

Eighth. The matters complained of by appellees in respect to the action of the assessors affords no ground for an injunction.

(a) Although the bill and proofs show that the assessment on appellees' shareholders was greater proportionately than the assessment on shareholders in the Mechanics and Farmers Bank, yet they also show that it was less in proportion than the assessment on other banks and other capital.

The bill and proofs also show that the assessment on appellee's bank was absolutely less than it should have been, and there is not in the bill or proofs the slightest foundation for claiming that the assessment on appellee compared with that on all, or the average of personal property or moneyed capital was relatively greater than it should be.

Now, admitting for the argument that the Assessors erred

in the principle of their assessments, the remedy of any one injured is to correct the action of the Assessors, not to claim it to be void.

The Assessors had jurisdiction.

There is nothing in the record to show that they did not fully comply with all the forms of law requisite to give jurisdiction to the Supervisors to levy the tax.

If now the erroneous action of individual assessors can be shown to *invalidate* the tax, what is the result?

Simply that a valid tax is impossible. Any *intentional* action, which could be shown to be *erroneous* action, would invalidate the whole tax.

The effect could not be limited to a ward, town or county. It would be the same in the whole State, so far as the State tax was concerned, for the effect would necessarily enter into the equalization of State taxes.

On the other hand, perfect justice to a party complaining is attained by regarding such taxes as erroneous, and not as void, and by requiring the party to avail of the remedies given him by law, to prevent an unfair proportion of the burden being cast upon him.

This, appellee attempted in the *certiorari* proceedings instituted by it, and its writ in those proceedings was quashed for the reason, that although it showed a discrimination against it as between it and the Mechanics' Bank, it also showed a discrimination in its favor as to others, and it failed to show on the whole that the tax against it was greater than it ought to be.

Appellee has made the same failure in this case.

It does not appear, and no one can say that its tax is greater than it ought to be.

The proper and only course is for appellee to show what is its fair proportion of the tax, and if less than the tax assessed to pay or tender *that amount*.

The case of Hassan vs. The City of Rochester, 67 N. Y., 528, is not applicable.

That was a case of local assessment. The local body in order to make a local improvement on Oak street, ordered one tier of lots on each side of said street to be assessed.

The assessors left out certain of such lots on the idea that as they belonged to the State they were not assessable.

The Court held the action of the assessors void, as without jurisdiction; on page 336 the Court says: "It is said that the duties of the assessor are of a judicial nature, and that their determination cannot be reviewed. This is true to a limited extent in regard to some of the powers conferred upon them; and *they act thus* in reference *to the amount* to be assessed against each owner and occupant, *for this is for the assessors to determine*; but it is otherwise as to the exclusion of territory, which is covered by the ordinance."

So in the case at bar. The *value is for the* assessors to determine. If in such determination they adopt a wrong rule of assessment, that is error of law; if they adopt a right rule but err in its application, that is error of fact; but surely neither error of law or error of fact can affect the jurisdiction of the assessor, or the validity of their action any more than error of a Court or jury would affect the validity of a judgment.

The case of Stuart vs. Palmer, 74 New York, 183, is also wholly inapplicable.

In that case an assessment for a local improvement was levied *without notice to* the owner of the land and without *his appearing* or having opportunity to be heard.

The law provided for no notice or hearing.

The Court held that such law was unconstitutional and gave no jurisdiction to the commissioners.

That to take the property of a citizen without notice to him and giving him an opportunity to be heard was a taking without "due process of law."

There was no other point decided in that case. Reference was made to the decision of this Court in Davidson vs. Williams, 17 Albany Law Journal, 96 U. S., 97, and its doctrines approved.

On page 189, the Court shows the difference between taxes and assessments.

The same subject is discussed in Roosevelt Hospital vs. The Mayor, 84 New York, 111 *et seq.*, where a hospital, exempt from taxation, was held liable to assessment.

So in all cases where the tax has been held void, it will be found that some condition precedent to *any* taxation has been violated, as in Henry vs. Chester, 15 Vt., 460, where the list had not been submitted for revision to the Board appointed for that purpose.

Appellee cites some cases from Wisconsin that are unique.

Such cases, however, are based upon the Wisconsin constitutional provision, requiring taxation to be uniform.

There is no such rule in New York, either of constitution or law.

Peo. vs. Mayor, 4 Comstock, 419-427.

Appellee says that the question whether where the record is straight and the proper certificate or oath filed you can make the whole tax invalid by showing error in the assessors seems never to have been decided in New York.

If such be the fact it is evidence of the strongest character against the existence of the rule it claims.

Such errors of the assessors have been notorious in New York for the past hundred years.

It is safe to say that there has never been a year or a tax district in which they have not occurred.

They have constantly been rectified in the manner provided by law for such rectification.

That it has never before occurred to any one on that account to claim that the whole tax is void raises the strongest presumption that it is not so.

See Hepburn vs. School Directors, 23 Wallace, 480.

Ninth. We submit that these judgments should be reversed, and that in the equity case the bill should be dismissed, and that in the law case a new trial should be awarded.

WHEELER H. PECKHAM,
RUFUS W. PECKHAM,
Of Counsel for Appellants and Plaintiff in Error.

H.

Chap. 140.

AN ACT to place and maintain shareholders of State banks, in the assessment and taxation of their shares of stock, upon an equality with shareholders of national banks.

Passed April 21, 1880, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The shareholders of any bank, banking association or corporation doing a banking business under the general banking law or a special charter of this State, shall be assessed and taxed with respect to their shares of stock only at the same rate and place, to the same extent and in the same manner as shareholders of national banks may be liable at the same time, to be assessed and taxed by authority of the State of New York; provided, however, that no debts shall be deducted from any such assessment of any person applying for the benefit of this Act, which have been deducted from the assessment of other personal property of such person, and in making application for such deduction every person making the application shall make oath that he has not applied to have such debts deducted from any other assessments against him, and that no such deduction has been made.

§ 2. It is hereby declared that the true intent and meaning of this Act is to place and maintain shareholders of banks, associations and corporations aforesaid upon an equality, in the particulars in this Act referred to, with the shareholders of national banks organized under the Act of Congress, entitled "An Act to provide a National Currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June third, eighteen hundred and sixty-four;" and all acts and parts of acts inconsistent with the provisions hereof are hereby repealed.

§ 3. This Act shall take effect immediately.

I.

Assessment of Bank Shares of Non-residents.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY GENERAL,
May 25, 1880.

HON. J. W. WADSWORTH, Comptroller:

DEAR SIR—I am in receipt of your communication of this date, referring to this office a letter to you from the secretary of the Commissioners of Taxes and Assessments of the City of New York, stating that said Commissioners desire an opinion "as to whether they can assess the stockholder of a National or State bank of this (New York) City, who resides in another State."

In reply, I have the honor to state that section 5219 of the Revised Statutes of the United States, under which the States have power to tax the shares of stock in National banks, provides, among other things, that "the shares of any National banking association owned by non-residents of any State, shall be taxed in the city or town where the bank is located *and not elsewhere*."

Chapter 140 of the Laws of 1880, which took effect on the 21st day of April, ult., by which our Legislature intended to place shareholders in State banks on an equal footing with shareholders in National banks, provides that "the shareholders of any bank, banking association or corporation doing a banking business under the general banking law or a special charter of this State, shall be assessed and taxed with respect to their shares of stock, only at the same rate *and place*, to the same extent and in the same manner as shareholders of National banks may be liable, at the same time, to be assessed and taxed by authority of the State of New York."

The portion of Chapter 671 of the Laws of this State of 1866, still remaining in force, provides that the shares of stock of stockholders in both National and State banks "shall be included in the valuation of the personal property of such stockholder, in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere; whether the said stockholder reside in such place, town or ward or not."

From the foregoing references to the statutes, both Federal and State, governing the matter in question, it follows, and I am of opinion, that the Commissioners of Taxes and Assessments of the City of New York, not only can lawfully, but it is their duty, to assess the stockholder of a National or State bank of said city who resides in another State.

Very respectfully yours,

HAMILTON WARD,
Attorney-General.

K.

National Bank Taxation

THE ATTORNEY-GENERAL'S OPINION IN REPLY TO THE COMPTROLLER.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY GENERAL,
ALBANY, March 29, 1880.

HON. JAMES W. WADSWORTH, Comptroller,
Albany, N. Y.:

DEAR SIR: I am in receipt of your communication referring to this office a letter from the Commissioners of Taxes and Assessments of the City of New York, calling your attention to the recent decision of the Supreme Court of the United States in the case of The People *ex rel.* Williams vs. Weaver and others, Assessors, "that the statute of the State of New York regarding the taxation of National bank shares, as construed by the Court of Appeals, is in conflict with the Act of Congress, and is therefore void."

As the Act referred to has been for the last fourteen years the sole basis on which the assessment and taxation of National bank shares have been made in this State, and as a very large amount of moneyed capital is invested in such shares, the matter to which your attention has thus been called is manifestly of grave importance.

In order to arrive at a clear understanding of what the Supreme Court of the United States has decided in the case re-

ferred to, and of the condition in which our statutes in relation to the assessment and taxation of capital invested in bank shares are left, as a necessary legal result of such decision, it will be necessary to examine the matter with some particularity.

At an early day the Supreme Court of the United States, after thorough consideration of the subject, held that the States could not lawfully impose any burdens or obstructions, under the taxing power, upon any legally constituted fiscal agency or machinery of the Federal Government, and the principle became well settled that neither the capital nor the shares in a National bank could be taxed by the States without authority therefor conferred upon the States by Congress.

Congress, however, has granted to the States power to tax such shares under certain restrictions. This authority is now found in Section 5219 of the Revised Statutes of the United States, which is in the following words:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions, *that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State*, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

To make the privilege conferred by Congress available, our Legislature enacted a statute (Ch. 761, Laws of 1866), providing a special method for assessing and taxing bank shares, applicable alike to National and State banks, thus segregating the capital invested in such shares from the general system under which other moneyed capital was assessed and taxed, but in supposed conformity to the provisions of the Act of Congress above referred to. The first section of the Act of 1866, the only part of the statute material to be considered here, is in the following words:

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes, at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessments there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided, further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal, and other taxation, to the same extent and rate and in the same manner as other real estate is taxed."

Under the provisions of the Revised Statutes of New York (1 Edm. St., 363), relating to assessments, and applicable to all personal property, except such as has been excluded from the operation of the general rule, by special enactment, persons owning taxable personal property are entitled to have their "just debts" deducted from the full value of such property, leaving the remainder only as the amount subject to taxation.

In the year 1875, the Assessors of the City of Albany assessed against Mr. Williams, a resident of such city, for taxation, the sum of $38,250 on account of shares owned by him in a National bank located in said city. He applied to the Board of Assessors, in due time and form, for the deduction of his just debts. The Board refused to make the deduction. He resorted to legal proceedings. The Court of Appeals (75 N. Y. Rep., 30) held that the Board of Assessors were justified in such refusal; that section one of the said Act of 1866, under which the assessment was made, did not permit such deduction, and that the

Act, thus construed, did not conflict with the restrictions imposed by Congress, and was therefore constitutional.

The case having been taken to the Supreme Court of the United States, on writ of error, that Court, accepting the construction given to the Act of 1866 by the Court of Appeals, say that "the effect of the State law is to permit a citizen of New York who has moneyed capital invested otherwise than in banks to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can make no such deduction; * * * that this works a discrimination against the National bank shares as subjects of taxation, unfavorable to the owners of such shares." And the Court decides that "the Statute of New York (§ 1, Ch. 761, Laws of 1866, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of National bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the Act of Congress." The judgment of the Court of Appeals was therefore reversed.

As to the effect of this last decision, it is not accurate to say that the Act of 1866 is now null and void. As construed by the Court of Appeals it is in one particular, as held by the United States Court, in conflict with the Act of Congress. The Court of Appeals had construed the Act to be special, and that in the matter of valuation it was exclusive of the provisions of the New York Revised Statutes applicable to the valuation of personal property generally. The Act says stockholders shall be assessed and taxed on the value of their shares. The Court of Appeals say this means on the value of their shares without deduction of debts. The Federal Court say, if that is what it means, and on this point we are obliged to take your construction, then, in this respect, the Act violates the law of Congress, and in this particular is void.

Had the Legislature incorporated into the Act of 1866 the substance of the clause of the New York Revised Statutes above referred to directing the Assessors to arrive at the valuation of the shares subject to taxation, by deducting from the full value thereof the sum of the just debts of the person whose shares are to be taxed, the Act would have complied fully with the law of Congress, and been valid throughout.

Other parts of the Act of 1866, not subject to this objection, still remain in full force. But it will be readily seen that the Act, after eliminating from it this invalid element, will stand in an emasculated condition, with altogether anomalous provisions and have a legal operation, in several respects, never anticipated by the Legislature.

For instance, the act in terms provides a system of assessment and taxation of shares in National banks and State banks. Its intention was to place both on the same equal footing. It denied to both the privilege of deduction of debts. The Legislature has not the power to so provide as to National bank shares. It has such power as to State banks. Hence the Act, standing as at present, shareholders in National banks are entitled to deduction of debts, because the Supreme Court of the United States so decides. Shareholders in State banks are not entitled to such deduction, because the Act of 1866, as construed by the Court of Appeals, does not permit it, and the validity of the Act in this particular is not questioned.

Again, as to the resident shareholder in a National bank, the Legislature may legally provide for the assessment and taxation of his shares, either at the place where the bank is located or at his place of residence. The Act of 1866 provides for such assessment and taxation at the place where the bank is located. Under the arrangement contemplated by the statute, for excluding deduction of debts, there was no inconvenience arising out of the matter of location. But now, when the National bank shareholder is held to be entitled to the same deduction of debts as owners of other kinds of personal property, the provision of the act fixing the place of assessment at the place where the bank is located will be found beset with difficulties. To illustrate by a single instance—a person owns shares of stock in a National bank located in a town in which he does not reside, and is assessed for such shares in that town. In the town of his residence he is assessed for other personal property. He is entitled to a deduction, for debts, to an amount in excess of the amount of his assessment at either one of such places, but which is less than the aggregate of both assessments. Only the difference between the amount of his just debts and the aggregate amount of both assessments is liable to taxation. Where and how is this amount of his debts to be deducted? The machinery of existing statutes is not adequate

to such a case. Other difficulties quite as serious, will be readily suggested, on a careful consideration of the Act in connection with the general statutory provisions for the assessment and taxation of personal property.

It is to be remembered, however, that the right of a person against whom an assessment of personal property is made, to have his debts deducted, as he may state the amount of them in his application on oath, to the Assessors for that purpose, is not an absolute right. They have jurisdiction to inquire into the justice of the application, and to adjust the amount to be deducted, or refuse under special circumstances to make any deduction at all, in the honest exercise of the judicial discretion conferred upon them by the statute. But the taxpayer has the legal right to make his application for the deduction of debts within the time and in the mode prescribed by law, and to have his application heard and justly acted upon by the Assessors. If he neglects to make such application, he has no standing in Court to dispute the correctness of the Assessors' valuation of his personal proerty which takes no notice of his debts. It is to be borne in mind also, that in the case recently decided by the U. S. Supreme Court, Mr. Williams did not sleep upon his rights but made application to the Assessors in due time and form to have his debts deducted. And the Court decided that Mr. Williams, under these circumstances, having fully complied with all the preliminary statutory requirements on his part, was entitled to have the amount of his just debts deducted.

He had applied for such deduction under existing statutory provisions, outside of the Act of 1866, applicable to personal property generally. The Court of Appeals had held that such provisions were not available to the bank shareholder, because the Act of 1866 did not permit it. In this respect the Act of 1866 is declared by the Court of last resort, the Supreme Court of the United States, to be unconstitutional and void. This void element of the Act of 1866 being thus eliminated, the rights of the holder of National bank shares must be determined by construing together, in connection with said decision, the Act of 1866, and all other existing statutes *in pari materia*, as constituting a statutory system for the assessment and taxation of personal property generally, which includes in its scope the assessment and taxation of National bank shares on a basis of

perfect equality with moneyed capital invested otherwise than in bank shares.

In conclusion, I am therefore of opinion:

1. That as to assessments of National bank shares the tax on which has already been collected, the decision in question does not effect such assessments where the shareholder so assessed did not make application to the assessors in due time and form for the deduction of the amount of his debts. Failing thus on his part, he is concluded by the assessment.

2. As to assessments already made, but the tax not yet collected, if the time allowed by law for making such application has elapsed and no application has been made during such time by the person assessed, he is concluded in like manner and cannot legally resist the payment of the tax.

3. As to assessments now made, on which the tax is not yet collected, if the time for making application for deduction of debts has not yet elapsed, the person assessed can apply within the time prescribed by law, and the assessors must act on such application as they are required to do in cases in which the applicant is assessed for personal property other than bank shares.

4. Holders of shares in State banks, as the statutes now stand, are not entitled to any deduction on account of debts.

5. The incongruities and inequalities in which the statutes, relating to the assessment and taxation of bank shares, are involved, by reason of the late decision of the United States Supreme Court, are matters for the consideration of the law-making power, and it is to be assumed that such remedial provisions will be made for the assessment and taxation of bank shares, both National and State, in harmony with the rule established by the decision, as will fully meet the emergency.

Very respectfully yours,

HAMILTON WARD,
Attorney-General.

FILED
JAN 19 1882
JAMES H. BAKEWELL, CLERK

SUPREME COURT OF THE UNITED STATES.

No. 817.

CHARLES A. HILLS, RECEIVER, &C., AND MICHAEL E. HIGGINS, MARSHAL, &C.,

Appellants,

against

THE NATIONAL ALBANY EXCHANGE BANK,

Appellee.

BRIEF OF APPELLEE AND DEFENDANT IN ERROR.

MATTHEW HALE,
Solicitor and Counsel for Appellee.

GEORGE F. EDMUNDS,
WAGER SWAYNE,
JULIEN T. DAVIES,
Of Counsel.

BURGOYNE, Law Case Printer (Law Telephone 587), 29 Rose Street, N. Y.

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U. S. Supreme Court.

No. 817.

CHARLES A. HILLS, Receiver of Taxes, and MICHAEL E. HIGGINS, Marshal of the City of ALBANY,
Appellants,

AGAINST

THE NATIONAL ALBANY EXCHANGE BANK,
Appellee.

BRIEF FOR APPELLEE.

Statement.

This case comes before the Court upon an appeal from a decree in favor of the appellee, adjudging Chapter 761 of the Laws New York of 1866, being "An Act authorizing the taxation of stockholders of banks and the surplus funds of savings banks," passed April 23d, 1866, void and inoperative as to shares of stock in National Banking Associations, and the assessment of the stockholders of complainant under said Act for the year 1879 illegal and void, and perpetually enjoining the appellants from collecting or attempting to collect said tax from the appellee or its stockholders (see decree, fols. 62 to 65).

The bill of complaint may be found at folios 4 to

44; the opinion of Judge Wallace at folios 169 to 184.

In the bill of complaint relief was asked, not only on the ground that the law of 1866 was in violation of the law of the United States, and therefore void, but upon the further ground that the local assessors, in making the assessment, violated both the law of the United States and the laws of the State of New York, and assessed the shares in complainant at a greater rate than other moneyed capital in the City of Albany, and at a greater rate than other property, real and personal. (See allegations, folios 16 to 28). The decision of the Court below, however, was put upon the sole ground of the invalidity of the Act, and the learned Judge did not find it necessary to examine the allegations and proofs respecting the conduct of the assessors. (See folio 174). The Act was held invalid and the assessment under it unauthorized and void under the decision of The People vs. Dolan, 36 N. Y., 59, and that of this Court in the case of The People vs. Weaver,

100 U. S., 539.

For convenience of reference in this and another case involving the same questions (No. 847), section 5,219 of the Revised Statutes of the United States, the law of 1866, other laws of the State of New York, relating to the assessment and taxation of property, the opinions of this Court in People vs. Weaver, and of the Court of Appeals in the case of The People vs. Dolan, and extracts from other opinions and decisions of the Courts of the State of New York, have been printed in an appendix which will be submitted to the Court herewith.

POINTS OF APPELLEE.

First.

THIS SUIT WAS PROPERLY BROUGHT AND THE REMEDY OF A PERPETUAL INJUNCTION WAS ONE TO WHICH THE COMPLAINANT WAS ENTITLED, IF THE COURT BELOW WAS RIGHT IN DECIDING THE LAW OF 1866, AND THE ASSESSMENTS COMPLAINED OF, TO BE VOID.

I. *No tender was necessary.*

The cases in which tender has been held necessary, were those in which it was admitted that a portion of the tax was valid, and in which the sole complaint was that the tax was excessive.

In the case of National Bank vs. Kimball, 103 U. S., 732, in which the bill was dismissed upon the ground that there was no offer to pay any sum as the tax which the shares of the bank ought to pay, this Court says, after laying down the general rule requiring a tender or offer to pay:

"An apparent exception to the universality of the rule is admitted in People vs. Weaver, 100 U. S., 539; Pelton vs. National Bank, 101 Id., 143, and Cummings vs. National Bank, Id. 153.

"It is held in these cases, that when the inequality of valuation is the result of a statute of the State, designed to discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the Court will also give relief" (page 735).

In the Kimball case it was not claimed that the law under which the assessments were levied was invalid. The sole remedy for the grievance complained of in this suit, was a change in the law, to conformity with the requirements of section 5,219. This change

the State of New York made, or attempted to make, in 1880, after the decision of this Court in the case of The People vs. Weaver (see appendix, page 10).

The only relief open to complainant in this case was not a reduction of taxation; but an adjudication that the amount charged upon its shares were not taxes, but illegal extortions.

If the Act of 1866 is wholly invalid, no middle course is logical or possible. The assessments on complainant's shares must stand or fall as a whole. There is no theory upon which a tender could have been made, if the Act of 1866 is void.

II. *It is well settled that a National bank can obtain an injunction to restrain the collection of illegal taxes imposed upon its shares, upon the grounds:*

A.

Of preventing injury to itself, for which no adequate legal remedy exists, such as a multiplicity of suits.

> Cummings vs. National Bank, and other cases, *infra*.

Under the act of 1866, the tax is made a lien upon the shares of any person not residing in the same place where the bank is located, and a right of action is given to the County Treasurer, Receiver of Taxes, or other officer, to collect the tax from the avails of the sale of the shares of stock of such non-resident owner. (Sec. 5). It is also made the duty of the bank and its officers to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of this act, until it is made to appear to such officers that the tax is paid (Sec. 6).

These provisions probably give a right of action against the bank to compel the application of the dividends to the payment of the taxes.

> McVeagh vs. City of Chicago, 49 Ill.
> National Bank vs. Commonwealth, 9 Wall., 353.

It appears in this case that several of the shareholders in May, 1880, served upon the officers of the bank a written notice forbidding them to pay taxes on their shares, alleging that the tax was unlawfully assessed, and revoking and countermanding any authority theretofore given to the bank or any of its officers, to pay the tax, demanding from the bank the moneys belonging to them, and denying the right of the bank to retain any moneys, or any part of any dividend or dividends belonging to them until the payment of the tax

(See complainants "Exhibit H," page 41).

Other stockholders made like verbal objections (folio 97).

These objections were made after the decision of this Court in the case of the People vs. Weaver (folio 99).

It is evident therefore that the complainant was exposed to a multiplicity of suits.

See also opinion Harlan J., in Evansville Nat. Bk., vs. Britton.

Cummings vs. National Bank, 101 U. S. 153.

Pelton vs. National Bank, Id. 143.

Dows vs. City of Chicago, 11 Wall. 108.

Hannewinkle vs. Georgetown, 15 Wall. 547.

City National Bk. vs. Paducah, 5 Cent. L. J., 347.

S. C. Thompson's Nat. Bank Cases, 300.

B.

As trustee for its shareholders.

N. Y. & N. H. R. R. Co. vs. Schuyler, 17 N. Y., 592.

In the case last cited, where a bill of complaint was filed to cancel spurious certificates of stock issued by an officer having apparent authority to issue them, which was sustained on the ground that the corporation was trustee for its stockholders, the Court says:

"The corporation is entitled to receive, and does receive, the gross amount of earnings, upon a trust, however, or at least under a duty, to pay over to the stockholders the net profits as dividends upon their stock" (p. 596). And again, "the same reason unerringly indicates the corporation as the organ through which the shareholders are to be heard when legal wrongs are to be redressed or equitable remedies are to be invoked" (p. 602, 603).

Second.

THE ASSESSMENTS IN QUESTION CANNOT BE SUSTAINED, UNLESS THE ACT OF 1866 WAS VALID AND SUFFICIENT TO AUTHORIZE THEM.

I. *Without the permission of Congress, the State of New York has no power to tax the shares of complainant.*

This was expressly held by this Court in the case of The People vs. Weaver, 100 U. S., 539, citing the cases of

McCulloch vs. Maryland, 4 Wheat, 316.
Osborn vs. Bank of U. S., 9 Wheat, 738.
Weston vs. Charleston, 2 Peters, 449.

II. *Nor were such shares subject to assessment and taxation by the State without valid legislation enacted by the State, in pursuance of and subsequent to the permission of Congress.*

A.

This kind of property had no existence prior to the passage of the National Banking Act in 1864. It was a "species of property thereby created" (75 N. Y., 37). It could not have been in the contemplation of any State

legislature prior to that time. No language of any State law, therefore, in force when that Act was passed, can be construed to be applicable to this species of property.

Com. vs. Ketner, 92 Penn St., 372.
Leavitt vs. Blatchford, 17 N. Y., 521.

B.

The language of Section 5219 that "the "*Legislature* of each State may determine and "direct the manner and place of taxing all the "shares," &c., indicates that Congress contemplated that legislation by the respective States would follow the permissive grant of power contained in this section. Congress has not attempted to confer upon State *officers* the power of assessing and taxing national bank shares. "They are the creatures of State law, and derive their powers in this respect, solely from State enactments" (Stetson vs. Bangor, 56 Me., 274). It has conferred certain power upon the State *legislatures* with certain limits and restrictions. The restrictive words are not in form checks upon assessing or taxing *officers*, but upon the power of the State legislatures, in determining the manner and place of taxation of the shares. The assessments in question cannot, therefore, be sustained under the general laws of the State of New York, but must be held void, unless the law of 1866, under color of which the assessments were made, is held valid.

III. *The assessments in question are illegal, because made without jurisdiction, if the Act of 1866 is invalid.*

A.

There is no general law of the State of New York, or any law relating to the city of Albany, whose provisions could be claimed, however unre-

servedly, to be applicable to National bank shares, except to the few shares, about 100 in all, which were owned by residents of the Sixth ward (folio 92). The assessors had no authority, except under the law of 1866, to assess any person for personal property, except in the ward of his residence.

> See R. S., of N. Y., Title II., § 5—Appendix pages 6 and 7, and Chap. 86, Laws of 1850, §§ 5 and 6, Sub. 1, Appendix pp. 8 and 9.

It has been repeatedly held and is well settled in the State of New York, that, under the general laws, assessors are absolutely without jurisdiction to assess any person for personal estate out of the town or ward in which he resides.

In Mygatt vs. Washburn, (15 N. Y. 316), it is held that:

"Assessors who enter upon their assessment roll, as liable to be taxed for personal property, the name of a person not a resident of their town or ward, at the time the assessment is made, act without jurisdiction, and are liable for the damages resulting from the collection of a tax founded on such entry."

This case has been followed in many later ones, of which some are the following:

> Dorwin v. Strickland, 57 N. Y., 492.
> Dorn v. Backer, 61 N. Y., 261.
> Wade v. Matheson, 4 Lans., 158, aff'd, 47 N. Y., 658.
> Newman vs. Supervisors, 46 N. Y., 676.
> Dorn vs. Fox, 61 N. Y., 264.
> Overing vs. Foote, 65 N. Y., 263.

B.

If the Act of 1866 is invalid, the assessors had no jurisdiction to assess even the shareholders residing in the Sixth Ward, because they had no jurisdiction over those shares of stock as subjects of taxation. Jurisdiction, both of the person and of

the property assessed, is essential to a valid assessment.

National Bank of Chemung vs. Elmira, 53 N. Y., 49.

IV. *No application to the assessors was necessary to strike from the rolls property they had no jurisdiction to assess.*

Hebrew Free School Ass. vs. Mayor, 4 Hun., 446.

See cases above cited.

V. *A special method of taxation of a specified class of property, excludes that property from the operation of a general system.*

State of Nevada v. 1st N. B. of Nevada, 1 Nevada, 348.

People vs. Dolan, 36 N. Y., 59.

McVeagh vs. City of Chicago, 49 Ill., 329.

Third.

THE LAW OF 1866 WAS IN VIOLATION OF THE RESTRICTION CONTAINED IN SECTION 5219 OF THE REVISED STATUTES OF THE UNITED STATES AND THEREFORE WAS WHOLLY VOID, AND THE ASSESSMENTS MADE UNDER COLOR OF THAT LAW WERE UNAUTHORIZED, AND HAD NO VALIDITY.

This is the necessary effect of the decision of this Court in the case of the People vs. Weaver.

It is claimed, on the other hand, that the only result of that decision is, that assessments on shares in national banks, made under the law of 1866, are to be considered void as to shareholders of national banks, who were in fact indebted, and made the application provided for by the State laws for a deduction of said indebtedness, but that the assessments of all other shareholders are valid and operative.

A.

This claim makes it necessary to discuss the effect of that decision, and in so doing to consider:

I. What was the question submitted to this Court in the case referred to? II. The decision of this Court therein; and III. The law of 1866 and its conclusive construction by the New York Court of Appeals.

I. In the case of *The People ex rel. Williams vs. Weaver*, the facts were agreed on and submitted to the General Term of the New York Supreme Court for decision. It was conceded that Mr. Williams had made the requisite affidavit of indebtedness and presented it to the assessors, and demanded that his assessment on his bank stock be stricken off (or reduced to the nominal sum of one dollar), and that the assessors had refused to comply with his demand. Upon these facts, three questions were submitted substantially as follows:

> (1) Ought the assessors to have complied with his demand? (2) Were they by the State law justified in their refusal? (3) If the State law justified their refusal, (it being conceded that under the laws of the State the assessors, made and were bound to make, a deduction for indebtedness in all cases of owners of moneyed capital other than bank stock), was such State law in violation of the laws of the United States, and therefore unconstitutional and void?
>
> The first and third of these questions were by the New York Supreme Court decided in the negative; the second in the affirmative. This decision was affirmed by the New York Court of Appeals upon the authority (so expressed in the judgment of affirmance) of the case of the People vs. Dolan, 36 N. Y., 59.

II. Upon this judgment being brought by writ of error before this Court, Mr. Justice Miller, in

pronouncing the judgment, after stating the case, conceded that of the *second* proposition decided by the New York Courts, involving the construction of the State statute, this Court "must accept the decision of the highest Court of the State, that the Act of 1866 took the money invested in bank shares out of the general provision of the law of 1850, which allowed a deduction of the debts owing by the shareholder from the value of the personal property, as a basis for laying the tax. In that respect we are bound by the decision of the Court of Appeals as the true construction of the State statute." The opinion then states that there was left for consideration only the third proposition, whether or not the State law thus construed was in violation of the United States law. After full discussion of this question in the opinion, the learned Court decided,

"That the Statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him from the valuation of his shares of National Bank stock that it allows to those who have moneyed capital otherwise invested, is in conflict with the Act of Congress."

Mr. Justice Miller shows, that by this unfriendly discrimination, by which bank shares were taken entirely out of the general laws and put under the Act of 1866, they were "taxed at a greater rate" than other moneyed capital, in violation of the restriction contained in section 5,219 of the United States Revised Statutes. He says, "the effect of the State law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. * * That this works a discrimination against the

national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt." (Appendix, p. 40.)

Nothing seems plainer than that this Court meant to hold that this *system* of taxation was illegal and void. What this Court meant to condemn was the *system* enacted by the State of New York, and acted upon for fourteen years, by which national bank shares were not taxable under the laws applicable to other moneyed capital, but, by force of a separate statute, mandatory upon the assessors, and prohibitory of obedience to Section 5219, were required to be assessed and taxed at *a greater rate* than other moneyed capital.

Assessing officers have no discretion as to the subjects of taxation. They must do what the statute commands, and nothing else; therefore they could not assess otherwise than unlawfully, and so they could not assess at all. The State law has provided for the taxation of national bank shares in *one way only* — that is the illegal way. The assessors, therefore, could not act at all, for they have no other power but to obey the State law. Congress has not *required* them to act at all, and has only authorized them to act according to State law, *if* the State law provided for equality. That it did not do.

III. It is apparent from an examination of the opinions of Judges Hunt and Parker, in the case of the People vs. Dolan (36 N. Y., 59), adopted by the Court of Appeals in deciding The People ex rel. Williams vs. Weaver, that the Act of 1866 established a separate system for taxation for bank shares, discriminating against that class of property. Judge Hunt gives a history of the taxation of banks in the State of New York, showing that such taxation has been "upon a plan by itself," which "excluded deduction for indebtedness from the

value of shares" (Appendix, pp. 11 to 23 inclusive). He then proceeds: "We come then to the inquiry whether under the acts of 1865 and 1866 *the same system* is carried out, and the shares are to be assessed and taxed at their value *without regard to the condition of the owner*, or whether *that system* was then abandoned" (p. 15); and he comes to the conclusion that "the system" was *not* abandoned, but continued, by the law of 1866.

Judge Parker pursues a similar course of reasoning and comes to the same conclusion. He refers to the language of the general statute, by which each person is to be assessed for his personal property *after deducting the just debts owing by him*, and argues that under the law of 1866 the value of bank shares, *without deduction for debts*, is to be added to the net amount of other personal property from which debts have been deducted (p. 21). He points out the difficulties of any other construction (p. 22). He calls attention to the language of the act of 1866, "shall be assessed and taxed on the value," and says that this language "devotes the whole value to taxation without reduction for debts, as has ever been the policy of the State in reference to the property which this is made to represent, and in perfect accordance with what we have seen to have been the object of the statute" (p. 25).

B.

Appellants cannot escape the conclusion that the law of 1866 is wholly void.

1. The learned counsel for appellants have heretofore argued, that since this Court has held that the Act of 1866, as heretofore construed by the Court of Appeals, is in violation of the Act of Congress, the latter Court will re-

code from its former decision, take back all that it has said about the intent of the Legislature to continue the old system of taxing bank stock, and make the State law conform to the requirements of the United States law, as construed by this Court. This is a most extraordinary assumption. The Court of Appeals has for thirteen years given a construction to the law of 1866 which has been acted upon throughout the State.

"The construction given to a statute of a State, by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text."

Leffingwell vs. Warren, 2 Black., 603.

The opinion in the Dolan case is not founded on the case in 4th Wallace. It is based on the peculiar language of the Act of 1866. No supposition can be indulged in, that is respectful to the Court of Appeals, that the Dolan case will be overruled by a different construction of identically the same statute, that was interpreted in this case.

The law of 1866, as construed by the highest judicial tribunal of the State, has been pronounced by the highest judicial tribunal of the Nation, to be a violation of the paramount Federal law and void. The Court of Appeals has never reversed, modified, or retracted its construction of this law announced in the People vs. Dolan. On the contrary, it was reasserted in The People vs. Weaver, and approved in Williams vs. Weaver (75 N. Y., 30, 36). This interpretation of the State law is conclusive, and has been accepted by this Court. The decision of the Court of Appeals that this State law did not violate the law of Congress has been *reversed*. It is now settled law that the Act of 1866 means what the New York Court of Ap-

peals said it meant; but it is also settled law that it violates the paramount statute and is void. Neither this Court nor the New York Court of Appeals has any power to *amend* an Act of the New York Legislature; and this Court cannot assume that any Court will try to do this.

See remarks of Waite, C. J., 92 U. S., 221.

H. Counsel for appellants said, in the Circuit Court, "The rest of the law of the State is still valid, still upon the statute book, and even if the law had said in so many words, no reduction shall be allowed, *yet the Act of Congress says he is entitled to it*, and hence that particular provision of the Act is worthless, and the rest of the Act is in full life. Because the Act, as construed, refused this right of reduction *which the Supreme Court held the shareholder entitled to*, such later decision does not wipe out the law, but only prevents the working of that portion which was illegal, and the rest of the statute remains valid." One fallacy connected with this reasoning lies in the incorrect statement that either the act of Congress, or this Court, says or has decided the proposition that a bank shareholder is entitled to a reduction for his debts. Neither the United States law nor the United States Supreme Court has said any such thing. There is nothing in the law of Congress requiring a deduction for debts. That is a matter entirely within the control of the State Legislature. If the State law permitted no such deduction from the assessment of *any* moneyed capital, the Act of 1866 would not violate the Federal Law in this respect. It is the discrimination against National Bank shares created by the refusal of such deduction from its assessment, coupled with the permission to deduct

debts in the case of other moneyed capital, that occasions the violation of the law of Congress. This discrimination lies at the basis of "the system" which the Act of 1866 was enacted in order to establish and sustain, and therefore *that act* is held to be void.

The Act of Congress says that shares in these banks shall not be taxed at any greater rate than other moneyed capital. The United States Supreme Court says, in People vs. Weaver, that the New York law by which such moneyed capital is taxed at such greater rate is void, and that, therefore, the relator was entitled to have the assessment against him vacated. This Court, in that case, expressly says that it is bound by the decision of the Court of Appeals; that the Act of 1866 justified the assessors in refusing Williams the deduction he asked. Surely, State assessors are as much bound by a decision of the highest Court of their State as this august tribunal. The argument that the United States Supreme Court decision will be met by the State assessors, by *hereafter* permitting a deduction for debts under the present law, is entirely unsound. State assessors, under the Law of 1866, have no authority to make such deduction. Such authority should be given only by a State law, and the State Law of 1866 did not authorize, but forbade it. The Act of 1866, therefore, is legally *no* law, so far as it relates to National Banks. Hence, the State Legislature, after the decision in The People vs. Weaver, found it necessary to enact a new law expressly providing for such exemptions and deductions in assessing bank stock, as were allowed in case of other personal property.

See Ch. 596, of 1880; Appendix p. 10.

The Act of 1880 should be regarded as a legislative confession of the absolute invalidity of the Act of 1866. Judge Wallace calls it a "leg-

islative exposition of the Act of 1866," and says:

"This Act was wholly unnecessary if, as is contended for the defendants, the original Act should be construed as though the provisions of the general laws relating to reductions were incorporated in it."

III. The assessors had no power under the law of New York except to assess without deduction they must assess on value exclusively without regard to any other consideration. It was a power *only* existing by statute, and that power was *asked* to assess on full value *alone*. That power they could not lawfully exercise, and they had no power to do *anything other than that*.

In the case of Markoe vs. Hartranft (American Law Reg., N. S., Vol. VI., pp. 487 493), in speaking of a State law that conflicted with the Act of Congress under consideration, the Court says:

"It is a case of void authority, not of irregularity in the exercise of lawful authority or of a mere discretion."

In the case of Mayor of Nashville vs. Thomas et al. (Golden (Tenn.), 600), at the suit of a stockholder who lived at Nashville, where the bank was located, it was held that a State law levying the taxes on the bank shares at the place of residence of the owner in the State, was wholly void, because in conflict with the Act of Congress.

Since the decision of People vs. Weaver, there have been decisions of the highest Courts of California and Alabama, holding that a State law taxing bank shares without deduction for debts, when the law of the State taxing credits generally permitted such deduction, was wholly void.

In Miller vs. Heilbron (S. Ct. Cal., Pacific Coast L. J., Vol. 8, p. 176), the Court says, in speaking of the case of People vs. Weaver, that

the Act of 1866 was therein held void "because in excess of the restricted power of legislation derived by the State from the section of the Act of Congress hereinbefore quoted." The Court then holds that "the restriction operates upon State legislation," and that the statute of California taxing bank shares is wholly void.

In Pollard, collector, vs. The State, *ex rel.* &c. (Bankers' Magazine, May, 1881, p. 881), the Court says:

"There was no statute in this State under the provisions of which a valid assessment of taxes could be made on such shares, as tested by the case of People vs. Weaver and other decisions of the United States Supreme Court."

The case of City Bank vs. Paducah (Thompson's Nat. Bank Cases, 300, 5 C.L.J., 347), holds that legislation upon the taxation of national bank shares in conflict with the Act of Congress is wholly invalid.

In Kimberly vs. Ely (6 Pick., 455), it is said:

"An Act of the Legislature which it has no constitutional right or power to pass, is a nullity, and *all* proceedings under it are void."

In the case at bar in the Circuit Court, Judge Wallace says:

"I am of the opinion that the only authority for the assessment is to be found in the Statute of 1866, and that act, as respects the taxation of shares in National Banking Associations, is radically vicious and *can have no operation.*"

Again Judge Wallace says, in speaking of the necessity he is under to hold the Act of 1866 wholly inoperative:

"The result must be attributed to ill considered legislation, which by attempting to impose an exceptional and unjust rule of taxation upon shareholders of National Banks, has so far overshot its mark, *as to exonerate them from any taxation.*"

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

Cooley on Constitutional Limitations, 227, 4th Ed.

IV. It is respectfully urged that the Court of Appeals of the State of New York, has already decided the principle involved in the proposition, that if the Act of 1866 be in conflict with the restriction imposed by Congress, so that it *may* produce results injurious to any of the shareholders, that Act is void, irrespective of the actual consequences produced by its operation. In the case of Stuart vs. Palmer (74 N. Y., 183), it was decided that a law imposing a local assessment without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, is unconstitutional, as violative of the guarantee of "due process of law," which both the Federal and State constitutions secure to every citizen.

It was further held that:

"*It matters not upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what* MAY, *by its authority, be done.*"

Section 5219 of the U. S. R. S. in effect restricts the Legislatures of States to passing laws for the assessment of shares that shall provide for their owners the same opportunity to be heard, and the same hearing upon their valuation for taxation, that is accorded to the owners of other monied capital.

The provisions of section 5219 establish the fundamental proposition, that the property of shareholders

ers of national banks is not taken by "due process of law," if the State statute under which assessments for taxation against their shares are made, neglects to provide the same opportunity to be heard and the same hearing and the same rights upon such hearing, that the law of the State gives to the owners of other moneyed capital.

The Act of 1866 has been decided by the Court of Appeals in the Dolan case and in People vs. Weaver, and by this Court in the latter case, to deny such hearing to the owners of bank shares.

"Due process of law requires an orderly proceeding *adapted to the nature of the case*, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights" (74 N. Y., 191). Because the Act of 1866 is not "due process of law," it is wholly void.

As it was immaterial to inquire in the case of the law declared void in *Stuart vs. Palmer*, whether or not the assessment had been in fact fairly apportioned, so is it immaterial to inquire in the case at bar, whether or not any of the shareholders of complainant were indebted and could have vacated their assessments for bank stock by reason of such indebtedness.

In Miller vs. Heilbron (*supra*) this same conclusion is reached. The Court says:

"It would seem to be unnecessary to add that the restriction operates upon State legislation, and, therefore, *the fact whether in a particular instance the owner of National bank shares owes any debts is immaterial.*"

V. Nor is the argument of defendant's counsel, that the question as to the invalidity of the law could in any event be raised by only one stockholder, namely by Mr. Williams, who made the affidavit and claimed a reduction, a sound one. The vice of the law lies at its very foundation. The general tax law, applicable to the whole State, provides that in preparing the as-

sessment rolls the assessors shall set down in the fourth column "according to the best information in their power, the full value of all the taxable personal property owned by such person *after deducting the just debts owing by him.*

1 N. Y. R. S., 390, Sec. 9; Appendix, p. 7.

The tax law relating to the City of Albany uses the same language. (Laws of 1850, p. 126, Sec. 6; Appendix, p. 8). The oath of the assessors under the general law, is, "that the said assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, *over and above the amount of debts* due from such persons respectively * * * according to our best judgment and belief."

Chapter 176 of the Laws of 1851, Section 8; Appendix, p. 9.

This statute did not confer any power as to National bank shares. One code, therefore, fixed a rule and classified the people to be assessed, excluding National bank shareholders. Then another code declared that the latter should be assessed on a different and unequal rule, which was illegal in its very essence and gave no jurisdiction or discretion to the assessors to put them in the class of equality.

It was the duty of the assessors then, in assessing every kind of personal property, except bank stock, to ascertain, "by the best information in their power," the value of each taxable inhabitant's personal property *after deducting his just debts.* The duty to deduct the debts and get at the *net* value of the property was just as imperative as any other duty. If the assessors knew or had trustworthy information that a person owning only $10,000 worth of taxable personal property justly owed $5,000, they had no right to assess such person for more than $5,000. The law assumed that tax-payers were, as a general

thing, more or less indebted, and this assumption was incorporated into the general tax law. The assessors were required to act in making such deduction upon their own information. They had no right to disregard their own information and refuse or omit to make such deduction on the ground that the taxable inhabitant had not presented his affidavit. Absence or sickness might prevent his making the affidavit; but still it was the duty of the assessors to make the deduction "according to the best information in their power." But, by the law of 1866, "the stockholders in such banks or banking associations *shall be assessed and taxed on the* VALUE of their shares of stock therein." No provision was made for deduction for debts; and the Court of Appeals says none was intended and none could be allowed under the State law. The assessors of Albany, in making the assessments in question, refused the deduction for indebtedness to Mr. Williams, who made the requisite affidavit, and did not, in respect to other stockholders, make deductions "by the best information in their power," and would have refused such deduction to all other stockholders who might have applied for it. As to all *other* personal property, the State law required them to assess only the *net* value after deducting debts; as to bank stock the law of 1866 required them to assess the shares at their full value, without deducting debts. This difference is in the laws themselves. It cannot be ignored by State or Federal Courts. It is a difference by which the *rate of taxation* of bank shares is made greater than that of other moneyed capital. The law of 1866, therefore, which creates this difference, was, and has, by this Court, been authoritatively adjudged to be in violation of the law of the United States, and void. The proof in this case is to the effect that several stockholders of complain-

ant were in fact indebted in 1879 to an amount exceeding all their taxable personal estate, including bank stock. Only one of them made application for a reduction, but others testify they would have done so had they not known that such application would have been refused (See Transcript of Record, fols. 103 to 110). It would have been a useless and vain ceremony for these or any stockholders to have applied for such reduction. The assessors were compelled by the State law to refuse it if made. The law never requires the performance of an idle or useless act.

Root vs. Franklin, 3 Johns., 208., 210.
Tracy vs. Irwin, 18 Wall., 549.

VI. The maxim that if a statute consists of independent provisions, one of which is declared void for unconstitutionality, the other constitutional provisions may stand, has no application to this case. The brief of counsel for appellants repeatedly discusses the law of 1866, as if that Act contained a distinct provision in so many words, refusing to bank shareholders the right to deduct debts, as if that provision could be struck out with the pen, leaving enough of the statute to authorize assessments of bank shares, and as if that remainder of the statute could be so taken with the general laws of the State as to permit the deduction of debts from such assessments. Their arguments mainly proceed upon these assumptions, not put forward directly, but by implication. These views absolutely ignore the language of the Act of 1866, and put before the mind a supposed statute in its place. The arguments based upon these suppositions are best answered by reading the Act of 1866. The refusal of the reduction for indebtedness, is, as has been above shown, at the foundation of the law of 1866. It enters into all its provisions. Strike out the language of this Act,

from which the Court of Appeals derives the view that deduction for debts is forbidden, and the operative words of the Act are gone. It is shown by the opinions of Judges Hunt and Parker, in the case of The People vs. Dolan, that the prohibition to allow deduction of debts is the essential feature of the distinct and separate system for the taxation of bank shares.

The Act of 1866 is fatally defective, because it does not contain an affirmative permission to the assessor to allow the deduction for debts. In view of the cases cited above, it is only necessary to repeat here the general proposition, that no law of the State of New York can be referred to as giving any authority to assessors over the bank shares of complainant for 1879, in addition to the Act of 1866. At page 30 of appellants' brief it is admitted that the general laws of New York, respecting the assessment of property, do not affect bank shares.

This is not a case of the invalidity of one of several independent provisions. There are no independent provisions in this law of 1866. The State law provides that stockholders shall be assessed and taxed on *the value of their shares*, not the value after deducting their debts; but in case of every other kind of personal property the assessors have no jurisdiction to assess anything more than the excess after deducting debts. Neither this Court, nor any State Court, had the power to change the basis of taxation provided by the law of 1866. Because such basis of taxation, when contrasted with the rule adopted by the State in regard to every other kind of moneyed capital, brought the law into conflict with the law of Congress, and thus rendered it void, the Legislature, the only tribunal which had the power to change such basis of taxation, did change it. Without in terms repealing the law of 1866, but recognizing the fact that the decision of this Court in

the case of the People vs. Weaver had declared that law to be inoperative and void, the Legislature, by Chap. 596, of the Laws of 1880, enacted a new system for the taxation of bank shares, by which the basis of taxation was changed, and expressly provided that each stockholder should be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of the State.

(See appendix, page 10.)

The portion of this law authorizing the assessment and taxation of bank shares is a re-enactment of the corresponding section of the law of 1866, with amendments intended to obviate the objection which this Court held fatal to the law of 1866.

This Court has determined the principles which are controlling in this case, in the case of U. S. vs. Reese, 92 U. S., 215.

The question involved there was the validity of an Act of Congress intended to enforce the 15th amendment of the Constitution. This Court held that the act in question, by its language, embraced cases of *any* wrongful refusal to permit an elector to qualify. It was conceded that under the 15th amendment a valid act might be passed to enforce the constitutional provision, that no preference in this respect should be given to one citizen over another on account of race, color, or previous condition of servitude.

But it was held that the language of the Act in question was so broad as to cover wrongful acts without, as well as within, the constitutional jurisdiction of Congress, and that this Court had no power to limit the effect of the Act by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. The Court says: "We are not able to reject a part which is un-

" constitutional and retain the remainder, be-
" cause it is not possible to separate that which
" is unconstitutional, if there be any such, from
" that which is not. The proposed effect is not
" to be attained by striking out or disregarding
" words that are in the section, but by insert-
" ing those that are not now there. Each of the
" sections must stand as a whole or fall alto-
" gether." And again, " to limit this statute
" in the manner now asked for would be to
" make a new law, not to enforce an old one.
" *This is no part of our duty.*" (Page 221). In like manner, to give the law of 1866, the construction claimed for it by the appellants, would be to amend the law by inserting in it a provision permitting the same reduction for indebtedness that is allowed in the assessment of other moneyed capital. In other words, the appellants ask this Court to do for the year 1879, what the Legislature did in 1880, namely, to make a new law such as the New York Legislature never intended to pass and never did pass, before 1880, the provisions of which should not be liable to the objection which this Court has once held fatal to the law of 1866.

The question now before the Court is strikingly similar to that decided in the case of U. S. vs. Reese, above cited. In each case the jurisdiction of the legislating body depends upon a permissive grant from a superior power. In each case it was attempted to exercise the power granted by passing a statute not in conformity with the restrictions of the grant. In each case it is attempted to sustain the law by limiting its operations to cases, which are within the permissive grant and do not violate the restriction. In the case at bar it is submitted, the entire statute must be held to be as completely

void as was the Act passed upon in the Reese case.

See also The Peo. vs. Comrs. of Taxes, 94 U. S., 415, 418.
Trade-mark Cases, 100 U. S., 92, 98, 99.
Allen vs. Louisiana, 103 U. S., 80, 84.

VII. The Law of 1866 was also violative of the restriction in section 5,219 of the R. S. of U. S., for the reason that it established a special system of assessment and taxation applicable to bank stock only, discriminating against that kind of property and in favor of other moneyed capital.

There were prior to 1880, no such stringent provisions as those contained in the Act of 1866, with regard to any other moneyed capital or personal property. Under these provisions no share of bank stock could possibly escape taxation. It is a notorious fact that all other personal property does in a great measure escape taxation under the laws of the State of New York. In the language of the Court of Appeals, in the case of *The People vs. Dolan*, after citing the provisions of this Act: "No "such provision was ever introduced into the gen- "eral tax law of this State or now exists under the "general system. These unusual provisions and "directions concur with the previous legislation in "indicating the statutory intent to establish for "bank shares a system of taxation peculiar to itself "and independent of the general system of taxa- "tion in existence in the State."

36 N. Y., 66; Appendix p. 11.

And see also the opinion of Judge Parker in the same case.

The practical working of this system is shown by the report of the referee in *Williams vs. Weaver*, appearing in the record which was put in evidence in this case (fol. 118), and is printed in the Appendix, p. 34, from which it appears, among other

things that large amounts of taxable property were in 1874 entirely omitted from taxation in the city of Albany (findings 14, 15, 16, 17, 30), that personal property throughout the State was assessed at unequal rates, ranging from 1-3 to 4-5 of its actual value (finding 16 and also findings 19, 20, 21, 22, 23). The whole report is an interesting exhibit of the inequality and injustice of the New York system of taxation.

C.

The Act of 1866 is invalid as to all classes of bank shareholders.

The case of People *ex rel.* Williams against Weaver decides, not that the assessor violated his duty in refusing Williams the deduction claimed by him, but that the assessment of Williams was void, for the reason that the Act of 1866 did not confer power to assess him, because it did not provide that he should be allowed a deduction for his indebtedness.

There are three classes of shareholders in national banks to be considered in applying this decision:

FIRST. Shareholders who are indebted to an amount equal to or exceeding the value of their bank stock, who have not used their indebtedness to reduce their assessment for other personal property.

SECOND. Shareholders who are indebted to an amount less than the value of their bank stock, who have not used their indebtedness to reduce their assessment for other personal property.

THIRD. Shareholders who are not indebted at all, or who have used their indebtedness to reduce their assessment for other personal property.

1. The case of People *ex rel* Williams vs. Weaver clearly declares the Act of 1866 invalid and inoperative with respect to the assessment of shareholders of national banks of the first class. These shareholders are clearly assessed and taxed on their bank

stock by the Act of 1866, at a greater rate than other moneyed capital in the hands of individual citizens of the State.

II. The Act of 1866 is invalid and inoperative to authorize assessments against the second class of shareholders, because no power is conferred by the Act upon assessors to take into consideration the amount of indebtedness in making or correcting assessments for bank stock, and such power is conferred upon them in assessing all other personal property.

As the only power conferred upon assessors by the Act of 1866, is to assess this class of shareholders at a greater rate than other moneyed capital, they are without jurisdiction to assess them at all for bank stock. If these assessments are invalid, the Court cannot make them valid by reducing them in amount upon consideration of the shareholders' indebtedness. The consequence follows, that, under the system of taxation attempted by the Act of 1866, a shareholder owning $100,000 of bank stock and owing $500, is not assessed upon any part of his $100,000 of stock.

III. It is claimed by appellants that the Act of 1866 is so far valid, as to authorize assessments against shareholders who are not indebted.

(a) Each one of the shareholders assessed who is not indebted, could successfully defend proceedings to collect taxes assessed under the Act of 1866. The shares of each one of this class of shareholders are taxed at a greater rate than other moneyed capital in the hands of individual citizens of the State. The Act of 1866 is clearly invalid to authorize assessments to any amount against shareholders who are indebted to an amount less than the value of their bank stock. This is so, because neither assessor nor court has power, in the face of the provisions

of the Act of 1866, to reduce their assessments by their indebtedness, and no tax but an admitted excessive tax, can be collected from them. It is evident, then, that the system of taxation created by the Act discriminates in favor of such stockholders.

A system of taxation that allows one who holds $100,000 of bank stock and owes $500 to pay no taxes, and compels one who owns $100,000 of bank stock to pay taxes upon a valuation of $100,000, clearly effects a discrimination in favor of the former individual. The language of Section 5219 U. S. R. S. and the decisions of the Courts upon this subject, establish the proposition, that shares of banks are themselves part of the "other moneyed capital" referred to in that section. The adoption of the construction that the Act of 1866 is invalid as to the first and second class of shareholders, but valid as to the third class of shareholders, leads, therefore, directly to a violation of this section (5219). Consequently the Act of 1866 must be invalid and inoperative to authorize assessments against the third class of shareholders.

b. If the Act of 1866 were valid to authorize assessments against shareholders of the third class, and invalid as to shareholders of the first and second classes, it is clear, that the taxes upon shareholders who are not indebted, would be unlawfully increased by the amount of taxes that could not be collected from the shareholders who are indebted. The amount of that increase cannot be ascertained by any practical method. It is a well known principle, that if an illegal tax be so joined with a legal tax, that

a separation is impossible, no taxes can be collected.

Bangs vs. Snow, 1 Mass., 181.
Stetson vs. Kempton, 13 Mass., 282.
Fullard vs. Hastings, 92 Mass., 570.
Drew vs. Davis, 10 Vt., 508.
Huse vs. Merriam, 2 Maine, 345.
Hubbard vs. Brainerd, 35 Conn., 563.

Hence the Act of 1866 must be invalid as to all shareholders.

(c) The power conferred by Congress upon the States, is to determine the manner and place of taxing *all* the shares.

A system of taxation that allows a large amount of the stock of National banks, to the extent of the difference between the value of those shares and the amount of the indebtedness of their owners, to escape taxation, while it compels the assessment in full of the shares of owners who are not indebted, is not a system for taxing *all* the shares. It is evident from a contemplation of the statute, and the purposes to be accomplished by it, that it would not have been passed at all, except as a means of taxing *all* the shares. It is clear that the general purpose of the Legislature would not be carried out by upholding this statute as a means of taxing only *some* of the shares. As the statute fails to afford authority to tax the shares of those who are indebted, it follows that the statute cannot stand for any purpose.

Cooley on Constitutional Limitations, 215 and 219.

Consequently, the Act of 1866, is invalid and inoperative to authorize assessments against the third class of shareholders.

(d) The intention and spirit of the restriction contained in Section 5219 U. S. R. S., was that in the entire process of taxation no discrimination should be made against National Bank

shares or their owners, as compared with other moneyed capital.

State legislation which makes the assessment and taxation of National Bank shares necessarily more expensive to the owners, than the assessment and taxation of other moneyed capital, is as much a violation of the spirit of Section 5219, as an excessive percentage or rate of valuation, or of taxation, would be.

The meaning of this Section was well set forth in the case of Providence Institution for Savings and Jewell vs. City of Boston (101 Mass., 105). The Supreme Court of Massachusetts says:

"It means that the rate upon a thousand dollars invested in such a bank shall be the same as a rate upon a like sum put out at interest on good security; that as far as mere taxation is concerned, the owner of the one investment shall fare neither better nor worse than the ascertained owner of the other; that banks are not to be oppressed or incommoded, nor their operations as agencies of the General Government to be prevented or impeded by invidious and unfavorable rates, as compared with other property of the same general kind in the same place."

In Lionberger vs. Rouse (9 Wallace, 468), it was held that the particular design of this Act was to restrain the States from "legislating adversely to the interest of the National Banks, and that there should be no unfavorable discrimination against them."

In Adams vs. Nashville (95 U. S., 19), its purpose was asserted to be to "protect these corporations, organized under Federal authority from unfriendly discrimination by the States, in the exercise of their taxing power."

In People vs. Weaver (100 U. S. 539), it is said to have been "manifestly designed to prevent taxation which should discriminate against

this class of property as compared with other moneyed capital."

The Act of 1866 prohibited the Assessor from taking into consideration the indebtedness of the bank shareholder, and this made it necessary for the complainant, even under the appellants' construction of the Act, to file a bill in equity to ascertain which, if not all, of its shareholders had been illegally assessed, and for whom it must retain dividends. The expense of this proceeding must necessarily fall on all the stockholders, those who are free from debt, as well as those indebted. A similar bill in equity would necessarily have to be filed by every National Bank, every year that the Act of 1866 remains in force.

A system which compels every National Bank to file each year such a bill in equity for its own protection in order to ascertain its duties to the taxing power, when no such necessity is laid upon any other class of moneyed capital, discriminates against National Bank shares by whomsoever held. For the reason that such a discrimination inevitably results from the operation of the so-called system of taxing bank shares, created by the Act of 1866, that statute must be pronounced radically defective and vicious. Consequently, the Act of 1866 should be held to be invalid and inoperative as to all National Bank shares.

(c) The value of the shares of stock of every shareholder who is not indebted is injuriously affected, by the fact that the Act of 1866 does not permit the deduction for debts from assessments. This property is not so desirable a form of investment as other moneyed capital in the hands of individual citizens of the State. Those who are indebted are deterred from investing in shares of National Banks by the fact that they are not allowed the same deduction from this class of property that is per-

mitted in the taxation of other moneyed capital.

By the Act of 1866 a discrimination is intended and effected against National Bank shares as subjects of taxation, no matter by whom owned, and irrespective of the indebtedness of the owner. Injury to every shareholder is to be assumed and presumed from the naked fact of this discrimination. In the case of People vs. Weaver, there was no proof of actual injury to the relator Williams, as the result of the defect in the statute. The Court assumed that owners of other moneyed capital were indebted, that they had reduced their assessments by affidavits of indebtedness, and that, therefore, Williams' bank stock was taxed at a greater rate than such moneyed capital. Judge Miller, in the People *ex rel. Williams vs. Weaver*, has well expressed this view in commenting upon the Act of 1866 and its peculiar defects:

"That this works a discrimination against the National Bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt."

Consequently the Act of 1866 is invalid as to all classes of holders of National Bank shares.

D.

The case of Van Allen vs. The Tax Commissioners, 3d Wallace, 573, seems to control the disposition of this case.

The Act of 1865 of the State of New York, was held therein invalid and inoperative with respect to assessments upon all classes of National Bank shareholders, for the reason that the Act did not provide for assessment of shareholders of State banks. It was not shown that the effect of the Act of 1865 was to tax National Bank

shares at a greater rate than shareholders of State Banks. No positive injury to shareholders of National Banks was shown would result from the operation of the system of taxation created by the Act of 1865. It was sufficient to condemn the system that it was different from that authorized by Congress.

Judge Nelson said: "The banks of the State are taxed upon their capital, and although the Act provided that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the State banks *may* consist of the bonds of the United States which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

In First National Bank vs. Faucher, 48th N. Y., 524, and in People vs. Tax Commissioners, 67th N. Y., the full force of this decision, absolutely annulling the entire Act of 1865, was conceded.

In the latter case, it was held that even a proviso in the Act of 1865 shared the fate of its main provisions. Such was also the view of this Court in the same case reported in 94 U. S., 415.

E.

The case of Austin vs. The Aldermen of Boston (7 Wallace, 694) is not an authority to limit the scope of the decree in this cause.

That case was brought before this Court by writ of error issued pursuant to the 25th Section of the Judiciary Act. This Court held that the only question of Federal jurisdiction of which it could take cognizance was, whether the plaintiff in error had been deprived of any right contrary to the Act of Congress, upon which he relied for protection.

The Court only looked at the case of the single shareholder, Austin, and having found that as to him the statute complained of did not produce re-

sults in conflict with the Act of Congress, it refused to take jurisdiction of the case.

No state of facts was presented to the Court by which it appeared that any shareholder was taxed otherwise than as the Act of Congress required. In the case at bar it appears that as some of the complaining shareholders were indebted, the Statute of 1866 does actually produce results in conflict with the Act of Congress, and is therefore void. The invalidity of the statute having been necessarily decided by the Circuit Court, in order to prevent results in conflict with the Act of Congress, that Court was asked, under its general equitable jurisdiction to grant a decree for the purpose of preventing a threatened and inevitable multiplicity of suits. The Circuit Court had jurisdiction of this cause by virtue of its general equitable jurisdiction. This case, unlike the Austin case, does not come here on a writ of error from a State Court. If it was not in evidence that some of the shareholders of the complainant were indebted, this Court might say that it did not appear, as a matter of fact, that the Act of 1866 produces results in conflict with the Act of Congress. But under the cases cited heretofore, it is respectfully submitted that the question of what results the Act of 1866 *may* produce, not what results it actually has produced, is the material question. This Court did not require proof that results had, as matter of fact, been produced in conflict with the Act of Congress, in disposing of the Act of 1865, in the case of Van Allen vs. the Assessors. In that case it was sufficient to condemn the Act, that the Act of 1865 did not conform to the limitations of the Act of Congress, and *might* produce results in conflict with it.

This Court having already decided, in People vs. Weaver, that the Statute of 1866 is void, it follows that the collection of any taxes assessed under it should be enjoined.

Fourth.

THE ASSESSMENT IN QUESTION IS ALSO VOID BECAUSE MADE IN PURSUANCE OF THE ACTION OF THE ASSESSORS IN ESTABLISHING A RULE OR PRINCIPLE OF VALUATION, THE NECESSARY RESULT OF WHICH WAS TO TAX THIS PROPERTY HIGHER THAN OTHER MONEYED CAPITAL AND HIGHER THAN THE AVERAGE RATE OF ASSESSMENT AND TAXATION.

See National Bank vs. Kimball, 103 U.S., 735.

It is alleged in the bill of complaint that "the said Board of Assessors had for many years prior to the year 1879 insisted upon assessing the shares of stock in your orator at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this State, although the attention of said Board of Assessors had been repeatedly called to the fact that they were thus violating the provisions of the laws of the United States; that there was in the year 1879, and had been for many years before, in the said Sixth Ward of the City of Albany, a bank organized under the laws of the State of New York, called the Mechanics' and Farmers' Bank; that the shares of said Mechanics' and Farmers' Bank were of very much greater value than the shares of your orator, the value of each share of your orator being less than 42 per cent. of the value of each share of the said Mechanics' and Farmers' Bank; that the attention of the said Board of Assessors had been repeatedly called to the difference in value between the shares of said banks, respectively, and that, so long ago as the year 1874, the said Board of Assessors had been brought before the Supreme Court of the State of New York upon a writ of *certiorari*, and the fact of such difference in value in the shares of said banks respectively had been clearly established and become well known to the said Board of Assessors; and the said Supreme Court had by its opinion declared that the assessment

made by the said Board of Assessors of said bank shares, by which the shares of your orator were valued at a much greater rate in proportion to their value than the shares of said State bank was erroneous and inequitable and improper. But still the said Board of Assessors persisted in such mode of assessment, and continued to, and did, in each and every year from and after 1874, to and including the year 1879, assess the shares of your orator at par and the shares of said State banks at par, thereby assessing the shares of your orator at a rate which said Board of Assessors well knew to be much greater than that at which it assessed the moneyed capital in the hands of individual citizens of said State, consisting of the shares in said State bank, the greater part of which shares were in fact held and owned by individual citizens of said State of New York" (fols. 18 to 20.)

The bill of complaint also contains other allegations of inequality in the system adopted by the assessors. It alleges many discriminations in favor of other property and against shares in National banks; among them, that real estate in said city was in said year assessed for taxation at not to exceed from 40 to 60 per cent. of its estimated actual value. (Fol. 23).

I. The proofs established the truth of these allegations. Mr. Weaver one of the assessors, who had held that office since 1871, stated that there were nine banks, State and National, in the Sixth Ward, of which all but two were national banks, and they were all assessed at their par value, without reference to their actual value, except to ascertain that they were worth as much as par. (Fol. 77). And that ever since he had been an assessor, bank stock had been assessed in the City of Albany in the same way. That he was a party to certain *certiorari* proceedings instituted in 1874, in favor of Chauncey P. Williams, and also was defendant in a suit brought by Mr. Williams which went to the

Supreme Court of the United States. (Fols. 78 and 79). The return made by the assessors to the writ of *certiorari* above referred to was put in evidence under a stipulation that either party might refer to it upon the argument. (Folio 92). (See Appendix, pages 26 to 33).

The actual value of each share of the several banks on the 1st day of September, 1879, the date of the assessment, was proved to be as follows:

Mechanics' and Farmers' Bank (a State bank) about $300 per share; National Exchange Bank (complainant), about $130 per share; Commercial Nat. Bank, about $275 per share; Merchants' Nat. Bank, about $210 per share (fols. 94 95); Albany City Nat. Bank, about $110 per share; First Nat. Bank, about $160 per share; Union Nat. Bank, about $110 per share; New York State Nat. Bank, about $175 per share; Albany County (State Bank), about $100 (fol. 98).

The statements of several of the banks made last before the time of the assessment were put in evidence. That of the Mechanics' and Farmers' Bank, with a capital of $350,000, showed a surplus of $650,000 (p. 36). That of the Merchants' National Bank, with a capital of $200,000, showed a surplus of $200,000 (p. 38). That of the National Commercial Bank, with a capital of $300,000, showed a surplus of $500,000 (p. 39), that of complainant, with a capital of $300,000, showed a surplus of only $120,000 (p. 40).

By referring to the return made by the assessors in 1874, it will be seen that they admitted that their attention had been called by Mr. Williams, then cashier of the complainant's bank, to the difference in value between the shares in complainant's bank and those of the Mechanics' and Farmers' Bank, and had been informed that the value of one share of the stock of complainant did not exceed about 41 per cent. of the value of a share of the Mechanics' and Farmers' Bank, and that he had demanded that the assessment of the

shares of complainant be reduced to 41 per cent. of the assessment of the shares of the Mechanics' and Farmers' Bank, which reduction they refused to make, and that they then stated "that this board "did not make any enquiries or investigation as to "the actual or market value of the shares of the "stock of said banks further than to satisfy them- "selves that such value was more than their par "value and they investigated then to ascertain the "par value of such shares, and this board decided "to and did adopt the nominal or par value of said "shares of stock as the standard of value in assessing "the shareholders on said shares of stock."

The assessors also annexed to their return copies of the then last statements of the two banks (National Exchange, and Mechanics' and Farmers') by which it appeared that at that time the surplus of the complainant was only $100,000, while that of the Mechanics' and Farmers' Bank was $650,000 (See Appendix, pages 31 and 32).

11. It appeared also by the testimony of Mr. Weaver that certain insurance companies whose statements were put in evidence, were assessed at only about 25 per cent. of what they returned as their taxable personal property. For instance, the Commerce Insurance Company showed by its statement, after making all deductions, taxable personal property amounting to $4,177 (pages 32 33). It was assessed at $1,200 (folio 81). The statement of the Albany Insurance Company, after making all deductions, showed taxable property amounting to $53,340.72 (page 34). It was assessed at $13,000 (folio 81). And on being asked to explain why these companies were assessed so much less than the balance appearing on their statements, the Assessor replied: "Because for the purpose of drawing manufacturing companies to Albany, we assessed them upon 25 per cent. of their taxable property, and in order to make it uniform among business corporations we adopted

the same rule in regard to insurance companies" (folio 81).

It also appeared that the same 25 per cent. rule was adopted in assessing a steam tow-boat line (folio 82); and that all manufacturing companies were assessed upon 25 per cent. of the amount that the assessors deemed them liable to be taxed upon (folio 82).

III. The rule adopted by the assessors as to real estate was to assess it at 60 per cent. upon the amount it would cost to duplicate it, and that rule was adopted and acted upon (folio 82).

The rules or systems of valuation were in direct violation of the law of the State.

(a) So far as the system in regard to national banks was concerned, this was so declared by the New York Supreme Court in the *certiorari* case to which this very assessor was a party. Judge Bockes says: "It is, as we think, entirely plain that the basis of assessment against the owner of shares of the stock of banks, as certified to us by the Board of Assessors in answer to the writ in this case is erroneous." And again, "The statute under which such action was taken was not duly observed" (Appendix, page 24).

Judge Countryman says: "This was a palpable violation of the laws of the State," and goes on to show that such violation necessarily was injurious to the relators (Appendix, page 24).

And again, in the case of Williams vs. Weaver, to which these assessors were parties defendant, the Court of Appeals uses equally decided language in regard to the misconduct of the assessors.

75 N. Y., 33; see Appendix, page 34.

See also the report of the Referee in the case last referred to, taken from the record in which it was expressly found as a fact, that the taxa-

tion of shares of complainant was *at a greater rate* than that of the shares in the State bank (Findings 1, 8, 10, 12, 31, Appendix, pp. 34 to 40).

The *certiorari* proceeding was in 1874; the decision of the Referee in 1877, that of the Court of Appeals above referred to in 1878; and still the assessors persevered and insisted down to and including 1879, in making the assessments upon bank stock in this illegal and unjust way.

Besides, this action of the assessors was in effect an intentional omission of the surplus of the Mechanics' and Farmers' Bank, or its value in the hands of its stockholders, amounting to $650,000, and the surplus of the other banks, from the assessment roll, and it is well settled that such intentional omission invalidates the whole assessment. This was held by the Supreme Court of the State of Wisconsin, in a very elaborate opinion in the case of Weeks vs. The City of Milwaukee (10 Wis., 242), where an injunction was granted to restrain the collection of a tax by the sale of real estate of the complainant. The same principle was decided by the Court of Appeals of New York in the case of Hassam vs. The City of Rochester (67 N. Y., 528). In this case it was also decided by the Court of Appeals, that the plaintiffs were not bound to offer to pay their proportion of the assessment in order to entitle themselves to an injunction.

The following cases also establish the same principle:

Henry vs. Chester, 15 Vt., 460.
Torrey vs. Millbury, 21 Pick, 65.

(b) The law of the State of New York required real estate to be assessed at its full value, and the assessors were required to make oath that they had made such assessment at "the sums which a majority of the Board of Assessors have

decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor." [See Appendix page 9.]

The assessors deliberately disregarded the law and assessed real estate at 60 per cent. of what they decided it would cost to duplicate it.

The law required the taxable personal property of insurance and manufacturing corporations to be assessed at its full value, and the oath required of the assessors contained a statement that the assessment roll contained a "true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll over and above the amount of his debts, &c., at the full and true value thereof according to our best judgment and belief." The assessors made a law or rule for themselves by which they assessed it at only 25 per cent. of its full value.

All these erroneous and illegal rules adopted by the assessors necessarily increased the rate of taxation of the complainant's shareholders and tended to put it above the average rate paid by other property. It was admitted that the assessed valuation of real estate in the County of Albany for the year 1879, was $49,167,339; personal property, $4,596,342; total $53,763,681. It will be seen, therefore, that the erroneous rules adopted as to real estate necessarily prejudiced the complainant and rendered its assessment at a higher rate than the average upon other property, especially when the testimony as to corporations is taken into consideration.

It has been repeatedly decided by the courts of this State, and is the settled law of the State, that a substantial compliance with the law requiring a certificate or oath, and prescribing its

form, was necessary in order to confer jurisdiction to impose or collect a tax.

Van Rensselaer vs. Witbeck, 7 N. Y., (3 Selden), 517.
Westfall vs. Preston, 49 N. Y., 349.
Hinckley vs. Cooper, 22 Hun., 253.

In the case first above cited, which arose under an assessment made in 1847, the plaintiff was assessed $23,800 on real estate, and $25,571 on personal property, and taxed upon such assessments the sums of $102.37 and $109.96 respectively. At that time the law required of the assessors a certificate (not an oath), that the assessors had estimated the value of the real estate at the sums which the majority of the assessors had decided to be the true value thereof, and at which they would appraise the same in the payment of a just debt due from a solvent debtor. The assessors in that case certified that they had estimated the value of the said real estate "at the sums which a majority of the assessors have decided to be proper." The Court of Appeals held that the assessment was wholly void; that a certificate substantially complying with the statute must be made and annexed to the assessment roll, in order to confer jurisdiction on the Board of Supervisors, and that the warrant and roll constituted a process in the nature of an execution, and must be construed together, and that the defect of jurisdiction was apparent on the face of the instrument, and it was no protection to the collector. The judgment below in that case in favor of the defendants, the supervisor and collector of the town of Greenbush, was reversed.

In 1851 the law was passed requiring an oath instead of a certificate, to the same effect as the certificate, to be written on the roll, signed by the assessors, and certified by the justice.

(See Appendix, page 9).

In the case last cited (22 Hun., 253) the defendant was Supervisor of the Town. The assessment in 1879, upon plaintiff was entirely for personal property. The affidavit of the assessors was that they had estimated the value of the real estate at the sums which a majority of them had decided to be the assessed value thereof, and omitted the clause "at which they would appraise the same in payment of a just debt," etc. The General Term of the Supreme Court held that the defect was jurisdictional, and that the defendant was liable in trespass.

These decisions of the New York Courts are based upon the theory, that the certificate or oath of the assessors showed affirmatively that they had not done their duty. In the language of Gardiner, J., in Van Rensselaer vs. Witbeck, the assessors "though prepared to violate "their duty and their oath of office, shrunk "from testifying to a gross falsehood to be re- "corded under their signatures." (Page 522.)

The record in this case does not contain the oath of the assessors. It will not be presumed, however, that they committed perjury, and it may be stated in justice to the assessors that their oath did not substantially comply with the statute, but conformed to the facts as testified to by Mr. Weaver. Whether it did or not, it is the unlawful mode of assessment, and not the fact that the assessors omitted to swear falsely in conformity with the statute which they had violated, that was held to render their assessment void.

In Wisconsin, where there is a similar statute, and the affidavit was in the form required by law, and it was proved by the assessor that he in fact made the assessment upon the basis of one-third the real value of the property, it was

held by the Supreme Court of that State that the assessment was illegal and void.

Schetler vs. City of Fort Howard, 43 Wis., 48.

This precise question seems never to have arisen in New York, but it is submitted that there can be no doubt of the correctness of the Wisconsin decision. An assessment conceded to be made in direct violation of the State law cannot be cured by a false oath that the law was observed. It is therefore of no consequence whether in this case the assessors made the statutory oath or not.

Sixth.

THE DECREE APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS, FOR THE REASONS ABOVE STATED, NAMELY:

1. That the law of 1866, under which the assessment was made was illegal and void.

2. That the assessment itself was made under a rule or system established by the assessors in violation of the law of the State of New York, as well as of the law of the United States, under which an unjust and excessive burden was necessarily imposed upon the shareholders of complainant.

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GEORGE F. EDMUNDS,
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Of Counsel.

APPENDIX TO BRIEFS.

SUPREME COURT OF THE UNITED STATES:

No. 817.

CHARLES A. HILLS, RECEIVER OF TAXES, ET. AL.,
Appellants,

vs.

THE NATIONAL ALBANY EXCHANGE BANK.

No. 847.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,
Plaintiff in Error,

vs.

EDWARD N. STANLEY.

MATTHEW HALE,
Solicitor for Appellee,
and
Attorney for Defendant in Error.

UNITED STATES SUPREME COURT:

ALBANY NATIONAL BANK CASES.

Nos. 817 and 847.

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SUPREME COURT OF THE UNITED STATES.

No. 817.

CHARLES A. HILLS, RECEIVER, &c., ET. AL.,
Appellants,

AGAINST

THE NATIONAL ALBANY EXCHANGE BANK,
Appellee.

No. 847.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,
Plaintiff in Error,

AGAINST

EDWARD N. STANLEY,
Defendant in Error.

APPENDIX TO BRIEFS OF APPELLEE AND DEFENDANT IN ERROR.

FIRST. THE LAW OF THE UNITED STATES, PERMITTING TAXATION OF SHARES IN NATIONAL BANKS.

Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National Banking Associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that

the shares of any National Banking Association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent according to its value, as other real property is taxed. (R. S. of U. S., section 5219.)

SECOND. THE STATE LAW UNDER WHICH THE ASSESSMENTS IN QUESTION WERE MADE, BEING CHAPTER 761, OF THE LAWS OF THE STATE OF NEW YORK, FOR 1866.

AN ACT authorizing the taxation of stockholders of banks and the surplus funds of savings banks.

PASSED April 23, 1866.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere; whether the said stockholder reside in said place, town or ward or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held to the whole amount of the capital stock of said bank or banking association. And provided further that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner as other real estate is taxed.

§ 2. Every individual banker doing banking business under the laws of this State is hereby required to declare upon oath before the assessor the amount of capital invested in such banking business, and each one hundred dollars of such capital for

the purpose of this act and for the purpose of taxation, shall be held and regarded as one individual share in such banking business, and such shares are hereby declared to be personal property. If such banker have partners he shall declare upon oath before the assessor the number of shares held by each of them in such banking business ascertained as above provided, and the shares so held by any partner shall be included in the valuation of his taxable property in the assessment of all taxes levied in the town, school district or ward where such individual banker is located and not elsewhere; and such individual banker shall pay the same and make the amount so paid a charge in his accounts with such partners; and if such individual banker have no partners, he shall be held to be the sole owner of all the shares in such business of banking, and the same shall be included in the valuation of his personal property in the assessment of all taxes levied in the town, school district or ward where his bank is located and not elsewhere.

§ 3. There shall be kept at all times in the office where the business of such bank or banking association, organized under the authority of this State or the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and of the number of shares held by each; and such list shall be subject to the inspection of the officers authorized to assess taxes during the business hours of each day in which business may legally be transacted.

§ 4. Sections ten and eleven of chapter ninety-seven of the session laws of eighteen hundred and sixty-five are hereby repealed.

§ 5. When the owner of stock in any bank or banking association organized under the laws of this State or of the United States shall not reside in the same place where the bank or banking association is located, the collector and county treasurer shall, respectively, have the same powers as to collecting the tax to be assessed by this act as they have by statute when the person assessed has removed from the town, ward or county in which the assessment was made; and the county treasurer, receiver of taxes or other officer authorized to receive said tax from the collector may all, or either of them, have an action to collect the tax from the avails of the sale of his shares of stock, and the tax on the share or shares of said stock shall be and remain a lien thereon until the payment of said tax.

§ 6. For the purpose of collecting such taxes, and in addition to any other law of this State not in conflict with the constitution of the United States relative to the imposition of

taxes, it shall be the duty of every such bank or banking association and the managing officer or officers thereof to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of this act until it shall be made to appear to such officer that such taxes have been paid.

§ 7. The privileges and f anchises granted by the Legislature of this State to savings banks or institutions for savings are hereby declared to be personal property, and liable to taxation as such in the town or ward where they are located to an amount not exceeding the gross sum of their surplus earned and in the possession of such banks or institutions, and the officers of such institutions or banks may be examined on oath, by assessors, as to the amount of such surplus; and the property of such banks and institutions shall be liable to seizure and sale for the payment of all taxes assessed upon them for said privileges and franchises.

§ 8. This act shall take effect immediately.

THIRD. EXTRACTS FROM THE GENERAL LAWS OF THE STATE OF NEW YORK RELATING TO THE ASSESSMENT AND TAXATION OF PROPERTY. (R. S. of N. Y., part 1, chap. 13.)

TITLE I, § 1. All lands and personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified.

§ 3. The terms "personal estate" and "personal property," whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

§ 4. The following property shall be exempt from taxation.

1. All property, real or personal, exempted from taxation by the constitution of this State, or under the constitution of the United States.

* * * * * *

7. The personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter. * * * *

§ 7. The owner or holder of stock in any incorporated company, liable to taxation on its capital, shall not be taxed as an individual for such stock. (1 R. S. of N. Y., 387, 388.)

TITLE II, § 5. Every person shall be assessed in the town or ward where he resides, when the assessment is made, for all personal estate owned by him. * * *

§ 6. The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on. * * *

§ 8. Between the first days of May and July, in each year, they (the assessors) shall proceed to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property, real or personal within the same.

§ 9. They shall prepare an assessment roll, in which they shall set down in four separate columns, and according to the best information in their power:

1. In the first column, the names of all the taxable inhabitants, in the town or ward as the case may be.

2. In the second column the quantity of land to be taxed to each person.

3. In the third column, the full value of such land, according to the definition of the term land, as given in the first title of this chapter.

4. In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him. (1 R. S., pp. 389 to 391.)

Title 4 of same chapter of Revised Statutes provides that all moneyed or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital, in the manner hereinafter prescribed. (1 R. S., 414.)

The provisions of title 4, prescribing the manner of taxation, were amended by chapter 456, of the laws of 1857, as follows:

§ 3. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assess-

ment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county.

FOURTH. So much of the law relating to the assessment and collection of taxes in the city of Albany, being Chap. 86 of the Laws of 1850, as bears upon the questions involved.

§ 5. Between the third Tuesday of April and the first day of September in every year, the board of assessors of the city of Albany shall ascertain by diligent inquiry the names of all taxable inhabitants in the several wards of the said city, and also all the taxable property, real or personal within the same.

§ 6. They shall prepare an assessment roll for each of the wards in the said city, in which they shall set down in separate columns, and according to the best information in their power:

1. In the first column the names of all the said taxable inhabitants of the ward, and also the names of all other persons having real estate belonging to them in the ward.

2. In the second column, and opposite the name of each such inhabitant or person, a brief and proper description, with the dimensions and boundaries of the real estate in the ward belonging to such inhabitant or person. * * *

3. In the third column, and opposite the description of each parcel of real estate, the full value of such real estate.

4. In the fourth column, and opposite the name of each inhabitant of the ward, the full value of all the taxable personal property owned by such inhabitant, after deducting the just debts owing by him, and his property invested in any stock of any corporation or association liable to be taxed for such stock as capital or otherwise.

§ 9. If any person shall at any time before the assessors shall have completed their assessments make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal

estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more.

The provisions of this section shall apply to any trustee, guardian, executor or administrator in their representative character.

§ 10. All real and personal estate liable to taxation, the value of which shall not have been specified by the affidavit of the person assessed, shall be estimated by the board of assessors at its full value, as they would appraise the same in the payment of a just debt, due from a solvent debtor.

§ 11. The corporations or associations liable to taxation, whose principal office or place of transacting the financial business of such company is situated in the city of Albany, shall make the same returns to the board of assessors aforesaid, or one of them, within the same time, and subject to the same penalties for neglect as prescribed in the general laws of the State in respect to returns by such corporations to assessors of towns and wards; and in case of neglect to make such return, the said assessors shall nevertheless proceed to assess the said corporations according to the best information in their power, in the same manner as if such returns had been fully made; but neither such assessment, nor the payment of any tax pursuant thereto, shall exonerate such defaulting corporation or association from the penalty incurred by neglecting to make any such return.

FIFTH. THE OATH REQIRED OF ASSESSORS.

Extract from chapter 176, of the laws of New York, for the year 1851, being "An act to amend the law for the assessment and collection of taxes."

* * * * * * * *

§ 8. When the assessors, or a majority of them shall have completed their roll, they shall severally appear before one of the justices of the town or city in which they shall reside, and shall severally make and subscribe before such justice, an oath in the following form :

We, the undersigned, do severally depose and swear that we have set down, in the foregoing assessment roll, all the real estate situated in the (town or ward, as the case may be) according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof and at which they would appraise the same in payment of a just debt due from a solvent debtor; and also that the said assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such persons respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full and true value thereof, according to our best judgment and belief, which oath shall be written on said roll, signed by the assessors, and certified by the justice, and shall be in place of the official certificate now required by law; and every assessor who shall willfully swear false in taking and subscribing said oath, shall be deemed guilty of, and liable to the penalties, of willful and corrupt perjury.

SIXTH. EXTRACT FROM CHAP. 596, OF THE LAWS OF 1880, WHICH LAW WAS PASSED AFTER THE DECISION OF THE CASE OF THE PEOPLE V. WEAVER, AND HAS SUPERSEDED THE LAW OF 1866.

The changes from the law of 1866, are indicated by italics.

§ 3. The stockholders in every bank, banking association *or trust company*, organized under the authority of this State, or by the United States, shall be assesssed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, *city*, town or ward where such bank, banking association *or trust company* is located, and not elsewhere, whether the said stockholder reside in said place, *city*, town or ward or not, *but in the assessment of said shares, each stockholder shall be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State*,

and the assessment or taxation shall not be at a greater rate than is *made or* assessed upon other moneyed capital in the hands of individual *citizens of* this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank, banking association *or trust company*, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank, banking association *or trust company;* nothing herein contained shall be held or construed to exempt the real estate of banks, banking associations *or trust companies* from either State, county or municipal taxes; but the same shall be subject to State, county, muncipal and other taxation to the same extent and rate, and in the same manner *according to its value* as other real estate is taxed.

SEVENTH. REPORT OF THE DECISION OF THE NEW YORK COURT OF APPEALS IN

The People ex rel, Peter Cagger v. *Thomas Dolan, and others, Assessors of the city of Albany.*

Decided Jan. 1867. (36 N. Y. 59.)

This is an appeal from an order of the General Term of the Third District, commanding the appellants, as assessors of the city of Albany, to reduce the assessment against the relator to the sum of one dollar, in accordance with the request contained in his affidavit. The facts are stated in opinion of the Court.

A. J. PARKER, *for the Appellants.*

SAMUEL HAND, *for the Respondents.*

HUNT, J. The relator resides in the Sixth ward of the city of Albany. The National Commercial Bank, in which he owns eleven hundred and four shares of stock, of the value of $20 each, is located in the Fourth ward of the same city. Under the act of the legislature of this State, passed April 23, 1866, the relator was assessed $22,800, as the par valuation of his bank shares. The defendants are the board of assessors of the city of Albany. On the 24th of September, 1866, the relator presented to the said defendants an affidavit in which he stated "that the value of the personal estate owned by him does not

exceed the sum of one dollar, after deducting his just debts, and his property invested in the stocks of corporations, liable to be taxed therefor," and claimed that the assessment should be reduced in accordance therewith to the sum of one dollar.

The defendants refused to reduce the assessment, and the relator moved at Special Term for a mandamus directing them to make such deduction. This motion was granted, and upon appeal by the defendants to the General Term of the Third District, the order was affirmed. The defendants now bring their appeal to this Court.

The respondents claim that assessment and taxation upon bank shares, authorized by the act of April 23d, 1866, stand upon the same basis as all other taxation of personal property, under the laws of this State; that the relator was entitled to deduct from such assessment, his personal indebtedness, and that he was subject to taxation upon the balance only. The appellants claim that there was intended to be established a distinct system of taxation, in reference to shares of bank stock, by which they were to be assessed and taxed upon their actual value, independent of the condition or circumstances of the owner.

By the general tax law of the State each individual is assessable in the town or ward in which he resides, and not elsewhere, for all personal estate owned by him. Between the first days of May and July, the assessors of each town are required to ascertain by diligent inquiry the names of the taxable inhabitants, and the taxable property, real or personal, and in their respective towns. In the fourth column of the assessment roll to be prepared by them, it is directed, that the assessors shall set down "the full value of all the taxable personal property owned by such person, after deducting the just debts owning by him." (1 R. S., 391.) It is the duty of the assessors to meet at a time appointed, to hear complaints and make corrections of their rolls. It was at the time thus appointed that the relator made the affidavit before set forth, and it is conceded that in regard to taxation for personal property generally, it was sufficient to entitle him to the deduction claimed.

The legislation upon the subject of the taxation of banks has been heretofore regulated upon a plan by itself, and a reference to this system will aid us in reaching a correct conclusion upon the question before us. The general system of legislation upon the subject matter of a statute may be taken into view, to aid the construction of a particular statute, relating to the same subject (*Holbrook* v. *Holbrook*, 1 Pick., 248,

254; *Mendon* v. *Worcester*, 10 id., 241.) The first statute of this State that imposed a tax upon bank stock, as such, was that of 1823 (Sess. Laws 1823, p. 390), which enacted "that all goods, chattels, bonds * * bank stock * * shall be subject to taxation, under the meaning of this act." By section fourteen the officers were required to deliver to the assessors a statement of their real estate, and the amount of their capital stock paid in, or secured to be paid in, and the assessors were directed to insert in the roll "the amount of such real and personal property." It was further provided, that it should be the duty of the cashier or treasurer to pay the amount of such tax "and to deduct the same from the dividends of the stockholders, in proportion to the amount of stock held by them respectively, except the stock held by the State, or by literary or charitable institutions, from which no deductions shall be made" (Sec. 15). The companies were further authorized to commute for such taxes, by the payment of ten per cent upon the amount of their dividends or income. The imposition of this tax was made upon the recommendation of the then comptroller of the State, and was the subject of complaint on the part of the banks. It continued, however, to be the law of the State, until the adoption of the Revised Statutes. By the Revised Statutes of 1828, it was provided that all moneyed or stock corporations, deriving an income or profit from their capital or otherwise should be liable to taxation on their capital (1 R. S., 414). The assessment of such corporations was made: 1. Upon the real estate owned by them if any, and 2. Upon the capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the State, and by any incorporation, literary or charitable institutions. The safety fund banking system, which came into operation in the year 1829, required that the capital of all banks should be fully paid in. At this time, then, banks, as such were taxable upon the amount of their capital stock paid in with the two exceptions stated, to wit: of stock held by the State, and by literary or charitable institutions. It was thus taxable, whatever might be the diminished value of its shares, unless it was able to show that it was not in the receipt of any income or profits whatever (id., 416). So on the other hand it was subject to no greater taxation, however valuable its shares might become. (*Bank of Utica* v. *The City of Utica*, 4 Paige, 399.) Its nominal capital was the standard of taxation, although its shares might be reduced below that value, or might be greatly above it. By the act of December 7, 1847 (4 R. S. (Edmond's Ed.), 151), it was enacted that all

individual bankers, and all banking associations "shall be subject to taxation on the full amount of actual capital paid in, or secured to be paid in, as such capital, by them severally, at the actual market value of such securities to be estimated by the comptroller, without any deduction for the debts of such individual banker or banking association."

It was also enacted that taxes upon incorporated companies should be demanded from the president of the company, and that the same should "be paid out of the funds of the company, and be rateably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock, if no dividends be afterwards declared." (1 R. S. (Edmunds' Ed.), 377, sec. 18.)

In the year 1853 this system was amended by providing that the assessment upon incorporated companies should be upon their real estate, upon the amount of their capital stock paid in, or secured to be paid in, together with the amount of all surplus or secured funds, exceeding ten per cent. of their capital, but deducting as before, the amount of said stock that should be held by the State, or by any literary or charitable institution. (1 R. S. (Edmunds' Ed.), 375.) And again, in the year 1857 (Session Laws 1857, 2d vol., p. 1) the legislature enacted that this assessment, with the exception aforesaid, should be upon the capital stock together with its surplus profits, exceeding ten per cent. "at its actual value," thus substituting the principle of ascertaining the value of the stock to be assessed, instead of taxing upon its nominal amount.

The law continued in this form, without alteration, with the exception of the invalid law of 1864, hereafter noticed, until the year 1865. The National bank system had then become established, and the State banks were rapidly organizing themselves under that authority. The legislature in that year passed an act (Laws of 1865, ch. 97, p. 172) legalizing and facilitating such transfers. In section 10 of the act, they enacted, that all the shares in any of the said banking associations held by any person or body corporate, should be included in the valuation of the personal property, of such person or body corporate, in the assessment of taxes in the town or ward where such banking association is located and not elsewhere. This act having been declared, by the Supreme Court of the United States, to be illegal, on a ground not here material, another act was passed by the legislature of New York, on the 23d day of April, 1866 (Laws 1866, p. 1,647), being the act under which the present question arises. By the first section of this act, it is provided that hereafter no tax shall be assessed

upon the capital of any bank, * * * * but the stockholders in such bank shall be assessed and taxed on the value of their shares of stock therein. The assessment is, to be made, in the place where the bank is located, and not elsewhere, and the proportionate value of the real estate of the bank is to be deducted from the stock of each share holder.

We thus see that for a period of nearly fifty years, the policy of the legislature in regard to the taxation of bank capital and bank shares, has been uniform. The stock has been taxed at its nominal value, without deduction for debts or charge for surplus, or, as more recently, at its actual value. We see that, as to individual bankers, it was expressly enacted, that the capital employed by them should be taxed at the market value of their securities employed, and without deduction for their individual debts. We see again that the taxation of the capital, was considered as the taxation of the shares, when the legislature enacted that such taxes shall be deducted from the dividends of the share-holders, or be charged against dividends subsequently to be made. In all of these statutes the assessment and taxation were based upon the value of the stock of the incorporation. The debits and credits, and actual funds of the banks established the subject of taxation, and the condition or circumstances of the individual owning the shares did not enter into the account.

We come then to the inquiry whether under the acts of 1865 and 1866, the same system is carried out, and the shares are to be assessed and taxed at their value without regard to the condition of the owner, or whether that system was then abandoned.

It will be borne in mind that the present question is upon the intention of the legislature, and not upon its power. The power of the legislature to say that the taxation shall be enforced, without regard to the circumstances of the owner, is not disputed. Prior to the organization of the National banking system, the State banks paying taxes upon their capital to the State, and to the municipal authorities, possessed an aggregate capital of more than a hundred millions of dollars. Nearly all of these banks have transferred themselves to the United States organization. The State possesses the same power of taxation upon the share-holders (with certain qualifications not here important to be noticed) that it formerly had upon the banks. It has exercised this power, has preserved the forms and manner of bank taxation, so far as they were appropriate, and has given no evidence of any intention to abandon the large field of taxation, so long used by it, or to

embarrass and reduce it by allowing the circumstances of the share-holders to form an element in the case. The statute, on the other hand, apparently intends to preserve, as fully as possible, all the connections before existing on this subject. It says that "no tax shall hereafter be assessed upon the capital of any bank or any banking association organized under the authority of this State or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein." It is quite unusual for the legislature to enact what they do not intend to tax, or what they do not intend to do in any respect. This preliminary statement, as here embodied, shows that the legislature wished to preserve the connection and identity as far as possible between these two subjects of taxation. It is as if they had said, we cannot now tax the National banks, as we have been accustomed to do; but instead thereof we will tax their share-holders, and we will apply to them, the system of taxation, that we have heretofore imposed upon the banks, so far as it is lawful to do so. If such had not been their intention it would have been very easy to have said, that shares in banks shall be taxed like other personal property, in the same manner, and subject to the same rules. On the contrary, they adopt a special system of taxation for those shares, in close resemblance to the mode of taxing bank capital, and declare that such share-holders shall be "assessed and taxed on the value of their shares." In the general statute which I have before quoted, the assessors are directed to assess to the person named, "the full value of all the personal property owned by such person, after deducting the just debts owing by him." (1 R. S., 391,) Upon the balance the tax is to be imposed. Under the present statute, no such reduction is referred to, but the person is to be "assessed" not only, but "taxed upon the value of their shares of stock therein." The difference is significant.

The direction of the assessors to deduct from the value of the shares of each person a proportionate sum for the real estate owned by the corporation, is significant also. It is so not only upon the principle of *expressio unius*, but as indicating the design of the framers of the statute. No such direction is contained in the general tax law, but real estate is there assessed and taxed in one column, and the residue of personal estate after deducting debts, in another. By the statutes of the United States, the real estate owned by a bank is taxable under the State authority, directly against the bank, and the revenue on that subject of taxation, is obtained as formerly. When the assessment is made upon the shares, the propor-

tionate value of the real estate is deducted; and the State thus obtains from the bank and the share-holder together, as it did before from the bank alone, a tax upon the full value of both its real and its personal estate. There are still other provisions of this statute, which are evidence of the legislative intention to arrange a system of taxation of this kind of property which should be separate from the general system. Thus by section 5, an action is given to the county treasurer "to collect the tax from the avails of the sale of his shares of stock, and the tax on such shares of stock, shall be and remain a lien thereon till the payment of the said tax." No such provision for the sale of choses in action, is declared by the general tax law, and no such lien is declared in any other part of the tax law of this State upon the property assessed. The sixth section also contains the unusual provision, that it shall be the duty of the bank to retain so much of the dividends belonging to such stockholders, as shall be necessary to pay the taxes assessed in pursuance of this act. No such provision was ever introduced into the general tax law of this State, or now exists under the general system. These unusual provisions and directions concur with the previous legislation in indicating the statutory intent, to establish for bank shares a system of taxation peculiar to itself, and independent of the general system of taxation in existence in the State. The act of April, 1863, chapter 240, is also strongly indicative of the same intention.

By that act, the legislature evidently intended to tax the whole available interest in the bank or in its shares. They there provided that a tax should be laid upon "a valuation" equal to the amount of their capital stock paid in, and the surplus earnings, less 10 per cent., without any deduction. This act was declared void by the Supreme Court of the United States, as laying a tax on the property of the bank, which property, in whole or in part, consisted of stocks of the Federal government. Immediately after this act was declared invalid, the acts of 1865 and of 1866, already cited were passed by the legislature.

It is argued in behalf of the respondents that, inasmuch as the statute directs the assessment of the bank shares to be included in "the valuation of the personal property of such stockholder," it subjects it to the operation of the general law in regard to assessments. It is to be observed, however, that this valuation is directed to be thus made, in the ward where the bank is located and not elsewhere, whether the stockholder reside in said ward or not. It was the case with this

relator, as it must be with many others, that he did not reside in the ward where the bank was located. It thus, by its terms, becomes at once distinguished from the general tax law, which requires this valuation to be made in all cases, at the residence of the stockholder, and the indication is given that this valuation was intended to be a part of the special system, which I have already discussed. I have endeavored to show that such was the intention, and this provision is not in conflict with that idea, but forms a convenient portion of the machinery to accomplish it.

It is said that the expression "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State" aids the argument of the respondent. It is argued that an individual owning a bond and mortgage for $1,000, and being indebted $500, could by the general law claim to have the $500 deducted from the value of his bond and mortgage, and that his assessment and taxation should be upon the remaining $500 only; and that the refusal of a like deduction in favor of the share-holder of $1,000, would subject him to taxation upon twice as large an amount as was imposed upon the individual. This, it is said, would be imposing a greater rate of taxation upon the shareholder. The "rate" or "ratio" is the percentage merely; the "proportion" the "degree" (Webster; Worcester.) If the State imposes a tax of five mills upon the dollar, on all the real and personal property of the State, five mills on the dollar is the "rate" the degree, the proportion, the percentage of taxation. This is distinct from the question of exemption. Alms-houses and institutions of learning, and the estates of clergymen, to a limited extent, are exempt from taxation. This exemption may compel the payment of a larger amount by the remaining tax payers, in an indirect manner, for the reason that so large a sum does not come into the treasury of the State as if there were no exemptions. If so, it is not because the rate is altered, but because there is less material upon which the tax may attach itself. Rate and exemptions are in no way connected. In their nature, they have no necessary relation to each other. The one directs how much shall be raised upon certain valuations, while the other directs what property shall be subject to taxation, and what shall be exempt. The possession of United States securities by a State bank exempts so much of its capital, as is thus invested, from State taxation, but the possession by a National bank of the like securities, does not relieve its share-holders to the like amount. Both of these propositions were decided by this court in *The City of Utica* v. *Churchill*, (33 N. Y., 161) and *Van Alen* v. *The Assessors*, be-

fore cited (2 Wall., 200); *Bank Tax Case*, (2 Black, 620.) The same question was decided by this court in October last. (*The People ex rel Kennedy* v. *The Commissioners of New York.*) The fact, therefore, that the same percentage will not produce the same amount of tax when imposed upon a State bank with a capital of $100,000, that it does when imposed upon national share-holders to that amount, does not affect the legality of the tax, and as a corrollary, does not impose a different rate of taxation. If it imposed a different rate, the tax would be invalid. The case of *The People ex rel* v. *The Commissioners of New York*, I understand to be decisive, against the argument now under consideration. (See opinion of DAVIES, Ch. J., pp. 15, 19. 20.

In *Van Alen* v. *The Assessors* (*supra*) the Supreme Court of the United States say "upon the whole, after the maturest consideration we whave been able to give that case, we are satisfied that the States possess the power to tax the whole of the interest of the share-holder, in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization" This proposition was asserted in denial of a claim that the interest of share-holders should be subject to taxation so far only as the capital of the bank was not invested in United States securities, exempt by law from taxation. I think it is correct in its application to the present case. The assessors did right in refusing to make the deduction claimed, and the order appealed from should be reversed with costs.

All the judges concurred in the foregoing opinion, except PORTER and BOCKES, J. J., who dissented.

PARKER, J. The question presented in this case is, whether a share-holder in a bank, or banking association, who has been assessed upon the value of his shares therein, pursuant to the act of 1866 (Sess. Laws 1866, chap. 761), is entitled, at the hands of the assessors, to a reduction of such valuation on account of his debts.

Upon a careful examination of the statute above referred to, in connection with the other statutes of the State on the subject of taxation, I do not think it contemplates the allowance of any such reduction.

The act itself shows that it was intended as a *substitute* for the then existing mode of assessing and taxing that portion of the property of the State invested in the capital of these moneyed corporations.

It begins as follows: "No tax shall hereafter be assessed

upon the capital of any bank or banking association, organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes, at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in such place, town or ward, or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State."

The reason of this substitution, as no one can doubt is to be found in the fact that, because of the investment of almost the entire banking capital in the State in the bonds and other securities of the United States, this large amount of personal property was escaping taxation (the banks not being taxable upon that portion of their capital so invested), and that by assessing and taxing the shares of stock in the hands of the stockholders (which are taxable), the entire amount might be reached, and made to bear its proportionate part of the burdens of State taxation.

To regard the act as intended merely to render taxable against individuals a species of property never before taxed, and to leave it to be treated, in reference to taxation, like all other taxable personal property, without any reference to the incidents and limitations which affected the taxation of corporations upon their capital, as the respondent's counsel insists it should be regarded, seems scarcely a correct view to take of it. Such was not, I think, the scope and object of the statute, but, as already intimated, to secure to taxation, the entire amount lost by the withdrawal of the capital of the banks therefrom. This is manifested, not only by the history of recent legislation and judicial decision on the subject of bank taxation, but by the provisions of the statute itself. The making of the stock taxable at the place where the bank is located, and requiring the bank to pay the tax, from the dividends of the stockholder, if not paid by him, is a strong indication of the object above assigned.

The banks had not the right to reduce the valuation upon which they were taxable, on account of their indebtedness; and there is nothing in the statute under consideration expressly giving the stockholder such right. Reasoning from the plain object of the act, as being, not to reduce the amount of property subject to taxation, but to produce the same amount of taxation in a different way, the inference is, that no such right was intended to be given.

It is insisted, however, that the right is, in effect, given by the provision that the "share shall be *included* in the valuation of the personal property of such stockholder in the assessment of taxes," understanding it as a direction to add the value of the shares of stock, to the value of all the taxable personal property owned by the stockholder, and then, from the aggregate to deduct his debts as required by the general statute in regard to the assessment of personal property. (1 R. S., 391, § 9, subd. 4, 1st ed.)

This general statute provides (and the special statute for the city of Albany is the same) that the assessors in preparing their assessment roll shall set down in the fourth column thereof "the full value of all taxable personal property owned by such person, *after deducting the just debts* owing by him." What, then, is "the valuation of the personal property of such stockholder in the assessment of taxes" in which the shares are to be included? Not the value of all his taxable personal property *before* the deduction of his debts, but the residue which shall remain after such deduction; "the full value * * after deducting the just debts." The assessment of the personal property mentioned is necessarily independent of that of the bank shares, for the valuation of the personal property in which they are to be included is not arrived at until after debts are deducted. Until all deductions on account of debts have been made, there is to be no including of bank shares in the amount. So that, even if we are to understand by the words "shall be included in" an adding and aggregating of amounts into one, I do not see any opportunity for deducting debts from the value of the shares of stock, the assessment of which is provided for in this act.

But that provision of the act, it seems to me, was intended merely to indicate that the assessors, in making up their assessment roll, should place the value of the shares in the column in which personal property is placed, so that it shall, in the assessment roll, comprise a part of the personal property there represented, not aggregated with the personal property of the stockholder, but separately placed, so as to show its separate amount, and ultimately, when the fifth column comes to to be supplied by the supervisors, the amount of tax with which it is separately chargeable. In such way it is embraced or "included" in the valuation of the stockholders personal property, in the assessment of taxes. It is true there is no specific direction to keep the amount separate in the roll, and yet it is impossible to carry out the other provisions of the law unless that is done; and there is no reason to be

drawn from the act, or the other acts relating to assessments against it.

The meaning of the term "included in" insisted upon by the respondent, can not be literally followed, for these shares are to be assessed in the place, town or ward, where the bank, or banking association is located, without reference to the residence of the stockholder. Unless he resides at the place where the bank is located, he will have no valuation of personal property there to which they can be added; and applied to such cases, the language must mean that they shall be comprised in the valuation of personal property upon the roll, and assessed to the stockholder, though not a resident.

Again, by the sixth section of the act, it is made the duty of the bank to retain from the dividends of the stockholder, so much as may be necessary to pay the taxes assessed upon his stock, pursuant to the act. It is necessary to the performance of this duty, that it shall appear what tax has been assessed, distinctively upon the stock; and hence the necessity of a separate statement of its value by the assessors, and a separate carrying out of the tax by the supervisors. The incongruity of the right claimed with this provision is manifest. If, when the stockholder resides at the place where the bank is located, the stock is to be mixed with his other taxable property, and then his debts deducted, how can it be ascertained what tax remains unpaid upon his stock, so that the bank can pay it, and deduct it from his dividend? If, in the ward where the bank is located, and in which the stockholder does not reside, as in the present case, he has stock assessed, for example, at $5,000, while in his own ward his personal property is assessed at $5,000, and he comes before the assessors and shows, that he is entitled to a deduction for debts to the amount of $7,000, so that the value of the personal estate owned by him, including his stock, after deducting his debts, &c., does not exceed $3,000, which assessment is to stand? At which place is he to be taxed upon this amount? The want of any provision on the subject, so plainly necessary, if the right claimed exists, indicates a want of intention to recognize and allow it.

The words used in the act to impose the tax, are "but stockholders in such banks and banking associations, shall be assessed and *taxed* on the *value* of their shares of stock therein." This language is not consistent with the claim of the respondent, that they shall be taxed on the value, after deducting debts.

The general statute (1 R. S., 389, § 5, 1st ed.) provides that

"every person shall be assessed in the town or ward where he resides where the assessment is made, for all *personal estate* owned by him." "Assessed for all personal estate owned by him" is, by subdivision 4 of section 9, construed to mean all his "taxable personal property, after deducting the just debts owing by him" — that is, the net personal estate, *what a man is worth* exclusive of his lands and other property not taxable, is what the general law intends to tax him upon, as personal property. The different language used in the act under consideration, is significant of a different intent in regard to this specific kind of property: "shall be assessed and taxed on the value," devotes the whole value to taxation, without reduction for debts, as has ever been the policy of the State, in reference to the property which this is made to represent, and in perfect accordance with what we have seen to have been the object of the statute.

The view above taken does not at all conflict with the provision in the act that shares shall not be assessed "at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State." This clause in the act is adopted from the forty-first section of the act of congress, passed June 3d, 1864, known as the National Currency Act, and inserted for the purpose of conforming the taxation directed by this to the requirements of that act. The clause in that act has just received a construction in the Supreme Court of the United States, in the case of *The People ex rel Duer* v. *The commissioners of taxes, etc.*, and is there held to mean "that no greater proportion or percentage of tax on the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens." This is in accordance with the view of this court in the same case, as expressed in the opinion of the court delivered by the chief judge. So that the fact that the assessment of the property is not subject to reduction for debts, while the assessment of other taxable personal property is, is no contravention of the restriction contained in the act.

For the reasons above assigned I am of the opinion that the order appealed from should be reversed, with costs.

PORTER and BOCKES, J. J., dissent.

Order reversed.

EIGHTH. EXTRACTS FROM THE OPINIONS OF THE NEW YORK SUPREME COURT IN THE CASE OF THE PEOPLE, ex rel, WILLIAMS AND OTHERS v. THE BOARD OF ASSESSORS OF THE CITY OF ALBANY. Decided November Term; 1874, (Reported 2 Hun, 583.)

BOCKES, J. This case is before the court, on the return to a writ of certiorari, having for its object the correction of assessments, made by the board of assessors of the city of Albany against the share-holders of stock of the National Exchange Bank of that city. The relators demand by way of relief, a reduction of the assessments against them on their shares of stock, either by the direct order of the court, or by a reversal of the proceedings of the board as to them, with directions, which would secure that result. There is also a motion on the part of the defendants to quash the writ.

The case has given us great anxiety in its consideration, surrounded as it is with perplexing questions, affecting both public and private interests. It is, as we think, entirely plain that the basis of assessment against the owner of shares of stock of the banks, as certified to us by the board of assessors, in answer to the writ in this case, is erroneous. The assessments have not been made against the share-holders "on the *value* of their shares of stock" as the law requires but were made as the fact is certified in the return, at par value, without regard to the true value, in excess of par. Such basis of assessment was in manifest disregard of the plain directions of the statute. This seemed so utterly indefensible, that, on first consideration of the case, we concluded to reverse the proceedings of the board of assessors, and to direct a re-assessment. But on further examination and reflection, we find that this disposition of the case would be attended with serious difficulties. Such revision of the roll, if ordered in this proceeding, could be but partial; nor would it at all correct the error we deem so palpable.* * * *

We are unwilling to give even apparent sanction to the action of the board of assessors, as certified to us in the return. The statute under which such action was taken, was not duly observed.

COUNTRYMAN, J. It is an undisputed fact appearing in the

return, that the board of assessors, in the assessment of all bank stock in the city of Albany, adopted as their standard of valuation the par value of the shares whenever the actual or market value was equal to or exceeded the par value, and regardless of the actual value whenever it exceeded par. This was a palpable violation of the laws of this State, requiring and regulating the assessment of property for the purpose of taxation * * * * The conclusion is inevitable that it was the duty of the defendants to have assessed the shares of stock in all of the banks at their true value instead of their par value, and that all of the assessments are unauthorized and erroneous where the actual value of the stock is above par.

It is urged, however, that the relators cannot complain, because upon their own statements, they have not been injured, as the shares of the National Albany Exchange Bank, in which they are stockholders, have only been assessed at their par value, whereas their real value as claimed by the relators themselves, is fifty-two per cent more than par; so that their assessments would be increased, on a re-assessment of their property pursuant to the statute. But this objection ignores another very important fact, to wit, that the shares of the relators are nevertheless worth only about forty-one per cent of the actual value of the shares of the Mechanics' and Farmers' Bank which are also assessed only at their par value. It thus appears, that as between the two banks, the shares of the former are assessed at the same valuation as the latter, whereas if the correct standard had been followed, the assessment of the former would have been fifty-nine per cent lower than the shares of the latter bank. It also appears from the reports of the officers of the Mechanics' and Farmers' Bank, annexed to the return, that the amount of surplus, and undivided profits in the bank, which escapes taxation, under the method of valuation adopted by the board of assessors, is over $750,000. The result is apparent that the amount of tax assessed against all the other taxable property included in the assessment roll must necessarily be increased.* * * * * * * We are constrained, in view of all the difficulties suggested, and the public embarrassments which would ensue from an interference at this time with the assessments, to supersede the writ, and the motion to quash must therefor be granted without cost.

Present, Bockes, Landon and Countryman, J. J.

Writ quashed, without cost.

NINTH. COPY RETURN OF THE ASSESSORS OF THE CITY OF ALBANY TO THE WRIT OF CERTIORARI, issued in November, 1874, referred to at fol. 92 of the Record in the case of *Hills, &c., et al, v. National Exchange Bank.*

To the Honorable the Justices of the Supreme Court of the State of New York, at a General Term thereof, now held at the court-house in the city of Schenectady, on the second Tuesday of November, 1874*:*

The answer or return of William J. Weaver, Edward Brennan and Robert H. Weir, composing and being the board of assessors of the city of Albany, to the writ of *certiorari* issued out of this court and duly served upon them, which writ is hereto annexed, is as follows:

By virtue of, and in obedience to, the annexed writ of *certiorari* to us directed, we do hereby certify and return to the aforesaid justices of the Supreme Court, the assessment of the aforesaid Chauncey P. Williams, and other share-holders of the National Albany Exchange Bank, and also the assessment of the share-holders of the Mechanics' and Farmers' Bank, a bank organized under the laws of the State of New York, upon the shares of the stock of said last named bank held by them, together with so much of the assessment roll of the Sixth ward of the city of Albany as effects the assessment of the said Williams and others, share-holders in the said National Albany Exchange Bank upon the shares held by them, and also all entries by them or either of them made of such assessments, and all proceedings, notices, communications, letters or papers relating to such assessment, received by, acted upon, or taken into consideration by them, or any oreither of them. All of which is hereto annexed and marked schedule A, and forms a part of this our return. That neither this board, nor any individual member thereof, has or had any information in relation to the actual value or market value of the shares of said banks respectively, other than the mere statement of Mr Chauncey P. Williams, that the shares of the National Albany Exchange Bank were of less value than those of the Mechanics' and Farmers' Bank; and as to the proportion existing between such bank stock, the only knowledge or information possessed by the board, consisted in the statement made by Mr. C. P.

Williams, the relator, to the board, after the first day of September, 1874, and before the issuing of this writ hereto annexed, and said Williams then stated to this board that the value of one share of the stock of said National Albany Exchange Bank did not exceed about forty-one per cent. of the value of a share of the stock of the Mechanics' and Farmers' Bank, and demanded that the assessment of the shares of said National Albany Exchange Bank be reduced to forty one per cent. of the assessment of the shares of the said Mechanics' and Farmers' Bank, which reduction this board refused to make.

That this board did not make any inquiries or investigation as to the actual or market value of the shares of the stock of said banks (further than to satisfy themselves that such value was more than their par value), and they investigated then to ascertain the par value of such shares, and this board decided to, and did, adopt the nominal or par value of said shares of stock as the standard of value in assessing the share-holders on said shares of stock. This board did not consider or examine the reports or statements of the condition of said banks, respectively, published pursuant to law in a public newspaper of the city of Albany, in making their valuation of the shares of said stock. And this board is informed and believes that the following are correct copies of the last reports, or statements published by the officers of said banks, respectively, prior to the first day of September last in a public newspaper in said city. The copies are hereto annexed and marked, respectively, E and F, and are to be taken as and to form a part of this return. That the assessment of the shares of the said National Albany Exchange Bank was not, and is not, at a greater rate, reference being had to the actual value and the market value thereof, than the said assessment of the shares of the said Mechanics' and Farmers' Bank, but that the rate is exactly the same. That this board has no evidence before it as to the rate of assessment imposed upon shares of banks organized under the laws of this State other than that such rate is the same as that imposed upon the shares of banks organized under the laws of the United States, the assessment in both cases being upon such bank shares at their par value, which as the board believes is in no case as much as their actual value. That Chauncey P. Williams is assessed as a resident of the Fourteenth ward of said city of Albany, and is assessed for personal property therein.

That hereto annexed and marked respectively B, C and D, and forming part of this return, are certain letters of Mr.

C. P. Williams, addressed to the board of assessors of the city of Albany, and dated respectively September 19, 1872, September 4, 1873, and August 31, 1874, which are all that have been received or taken into consideration by such board in relation to the actual or market value of such aforesaid shares.

That the assessment upon the share-holders of bank stock in the two banks aforesaid, is made upon the nominal or par value of said shares, deducting from said nominal or par value, such sum as is in the same proportion to such nominal or par value as is such assessed valuation of said real estate. And the same rule is followed in the assessment of all bank shares throughout the city. It is supposed generally that the shares of the Mechanics' and Farmers' bank are of greater value than those of the National Albany Exchange Bank, but the only knowledge of the board of assessors upon that point is the general belief in the city that the shares of the one bank are more valuable than those of the other.

All of which we do hereby certify and return as within we are commanded. In testimony whereof we have hereunto set our hands and seals this 10th day of November, 1874.

WM. J. WEAVER,
EDWARD BRENNAN,
R. H. WEIR,
Board of Assessors of the City of Albany.

"A."

STOCKHOLDERS IN NATIONAL ALBANY EXCHANGE BANK.

Name of party assessed.	No. of shares.	Par value deducting value of real estate.
C. P. Williams	405	$36,450
J. B. Williams	50	4,500

And all the other stockholders in the bank in the same way upon the par value of their shares, deducting in proportion, etc., for real estate held by the bank.

STOCKHOLDERS IN MECHANICS' AND FARMERS' BANK.

Name.	Shares.	Deducting real estate, etc., value.
Thomas W. Olcott	700	$56,000
E. Robinson	9	720

And all the other stockholders in the bank in the same way upon par value of their shares, deducting in proportion, etc., for real estate held by bank.

"B."

ALBANY, 19*th September*, 1872.

To the Assessors of the City of Albany:

GENTS.—I inclose a list of our share-holders. I have not made the extension for the reason that we shall claim that our shares be placed upon the tax roll at a valuation somewhat nearer than heretofore the assessed valuation of other property. We find, too, that bank shares in other proportions of the State are assessed from thirty to seventy-five per cent of their par, while here we have been paying taxes on full valuation. We claim, therefore, that the assessors place our shares on the tax list at a valuation not greater than that for other personal property. When that is fixed upon we will make the extension, if you wish.

I inclose a pamphlet on the subject of assessment of corporate property.

Very truly yours,

C. P. WILLIAMS.

"C."

To the Assessors:

I have made, in accordance with your request, and herewith furnish, a list of share-holders of this bank, and have extended the valuation of each share at ninety dollars as requested. But I hereby especially protest against the shares being included in the assessment roll at this valuation, unless other bank stocks, and other property, generally, shall be assessed at corresponding values in proportion to *real value*.

Please understand our compliance with your request as in no manner expressing or implying assent to the same.

Very respectfully yours,

C. P. WILLIAMS.

ALBANY, *September*, 4, 1873.

"D."

ALBANY, *August* 31, 1874.

Messrs. EDWARD BRENNAN, WM. J. WEAVER, R. H. WEIR, *Assessors:*

GENTLEMEN.—Our president, Mr. William Gould, has this morning handed me your note to him of eighteenth instant, which, on account of his absence from the city he had failed to

receive earlier. You refer to a call made by you at the bank, twelfth June, for a statement. At that date I was myself out of town, and, although after my return I was informed of your call and request for a statement, not knowing what statement the law called upon us to furnish, I conclude to wait; expecting probably a further call, when you might enlighten me.

The law, as I understand it, requires us to keep, at all times, in the office where its business is transacted, "a full and correct list of the names and residences of all the stockholders of the bank, and the number of shares held by each; and such list shall be subject to the inspection of the officers authorized to assess taxes during the business hours of each day in which business may be legally transacted."

We know of no other statement to be legally required of us than this, and this has been and still is and will continue to be ready for your inspection whenever you may desire to examine it. Should you wish anything beyond this, on your showing us legal authority therefor, we shall cheerfully comply, or if we can do you any favor proper for us to grant, we shall be happy to do so when requested *as such.*

But is it not well for us on each side to hava an understanding as to just what each has a *legal right* to demand of the other.

I have no doubt it is your aim to act only within your lawful authority, as it is ours to comply with every lawful requirement. Will you not, therefore, have the kindness to inform yourselves just what, in the particular under discussion, you have *a right to demand*?

I have aimed to say what is here written in all courtesy, with no desire to be difficult, or to place any obstacle in the way of your discharge of your duty, but in the hope of promoting a better understanding.

Very respectfully yours.

C. P. WILLIAMS,
Cashier.

"E."

REPORT OF THE CONDITION OF THE NATIONAL ALBANY EXCHANGE BANK, AT ALBANY, IN THE STATE OF NEW YORK, AT THE CLOSE OF BUSINESS ON THE 26TH DAY OF JUNE, 1874.

Resources :

Loans and discounts	$1,094,757 69
Overdrafts	116 12
U. S. bonds to secure circulation	316,000 00
Other stocks, bonds and mortgages	40,500 00
Due from redeeming and reserve agents	381,742 69
Due from other National banks	194,093 64
Due from State banks and bankers	35,541 40
Real estate, furniture and fixtures	35,271 09
Checks and other cash items	45,651 86
Exchanges for clearing house	12,583 09
Bills of other National banks	9,562 00
Fractional currency (including nickels)	2,207 97
Specie (including gold treasury notes)	965 00
Legal tender notes	141,000 00
U. S. certificates of deposit for legal tender notes	10,000 00
	$2,320,042 55

Liabilities :

Capital stock paid in	$300,000 00
Surplus fund	100,000 00
Other undivided profits	56,275 14
National bank notes outstanding	261,800 00
Individual deposits	958,958 68
Demand certificate of deposit	1,175 00
Due to other national banks	601,471 75
Due to State banks and bankers	40,361 98
	$2,320,042 55

STATE OF NEW YORK, }
COUNTY OF ALBANY, } *ss:*

I, Chauncey P. Williams, cashier of the National Albany Exchange Bank, do solemnly swear that the above statement is true, to the best of my knowledge and belief.

C. P. WILLIAMS,
Cashier.

STATE OF NEW YORK, }
COUNTY OF ALBANY, }

Sworn to and subscribed before me, this 7th day of July, 1874.

WM. E. CORNWELL,
Notary Public.

Correct — Attest,
WILLIAM G. THOMAS,
WM. MCELROY,
S. B. MCCOY,
Directors.

"F."

QUARTERLY REPORT OF THE MECHANICS' AND FARMER'S BANK, ON SATURDAY, THE 20TH DAY OF JUNE, 1874:

Resources:

1.	Loans and discounts	$1,687,460 82
2.	Overdrafts	994 89
3.	Due from banks (coin and currency)	918,139 03
4.	Due from directors of the bank, $31,500	
5.	Due from brokers and bankers, N. Y. city on demand	1,488 05
6.	Real estate	80,000 00
7.	Specie	840 00
8.	Cash items, viz.: Notes, checks, revenue stamps, exchanges, etc	21,293 54
	Fractional currency	2,515 00
9.	New York State stocks	172,000 00
10.	Bonds and mortgages	
11.	Bills of solvent banks and U. S. legal tender notes	75,085 00
12.	Loss and expense account	
13.	Assets not included under either of the above heads, viz.:	
		$2,959,816 83

Liabilities.

1.	Capital	$350,000 00
2.	Surplus fund	650,000 00
3.	Profits, less July dividend	106,839 15
4.	Profits, less real estate account	77,000 00
5.	Due to banks	128,401 80
6.	Due individuals and corporations, other than banks and depositors	
7.	Due Treasurer of the State of New York	701,924 92
8.	Due depositors on demand	945,550 46
9.	Amount due, not included under either of the above heads, viz:	
	Express Co	100 00
		$2,959,816 83

STATE OF NEW YORK, }
COUNTY OF ALBANY, } *ss.:*

Thomas W. Olcott, president, and Dudley Olcott, cashier, of Mechanics' and Farmers' Bank, a banking association located and doing business at Albany, in said county, being duly and severally sworn, each for himself saith, that the foregoing is in all respects a true statement of the condition of said bank, before the transaction of any business on the morning of Saturday, the 20th day of June, 1874, in respect to each and every of the items and particulars above specified, according to the best of his knowledge and belief; and that the business of said bank has been and is transacted at the location aforesaid.

THOMAS W. OLCOTT,
President.
DUDLEY OLCOTT,
Cashier.

Severally subscribed and sworn by both deponents, the 1st day of July, 1874.

GEO. G. DAVIDSON,
Notary Public.

TENTH. Extract from the opinion of the Court of Appeals in the case of *Williams* v. *Weaver*, referred to in the record in *Hills* v. *Bank*, at fol. 118, and in the record in *Supervisors* v. *Stanley*, at fol. 193.

Decided Nov. 12, 1878. Reported 75 N. Y., 30.

MILLER, J. It may be assumed as entirely clear that the basis of assessment against the owners of shares of stock of the Albany National Exchange Bank was erroneous. These assessments were not made on the value of the shares of said stock, as required by law (S. L. 1866, chap. 761), but were made at the "par value" without regard to their real value in the market. The effect of such a valuation necessarily must be to make great inequality and, as the record in this case shows, to impose upon the shareholders whom the plaintiff represents a greater burden of taxation than that which would properly belong to them.

ELEVENTH. Decision and findings of the referee in the case of *Williams* v. *Weaver*, in the Supreme Court of the State of New York.

I, Augustus Schoonmaker, Jr., referee in this action, having been attended by the counsel for the respective parties, and having heard their proofs and allegations and duly considered the same, do find, decide, and report as follows:

First. I find the following facts: that prior to and during the year 1874, the National Albany Exchange Bank was a banking association duly organized under the general banking laws of the United States, namely, the act of Congress approved June 3, 1864, entitled an act to provide a national currency secured by a pledge of the United States bonds, and to provide for the circulation and redemption thereof, and was located and carried on business in the Sixth ward of the city of Albany. The capital of the bank was three hundred thousand dollars in the year 1874, and the same, or an amount equivalent thereto, was all invested in bonds of the United States for the purpose of procuring circulating notes, under the act of Congress aforesaid. The shares were one hundred dollars each — the surplus one hundred and fifty-six thousand two hundred and seventy-five dollars, and during the period for making assessments in

1874, that is to say, from May 1 to September 1, said shares were of the actual value of at least one hundred and thirty dollars each. That the plaintiff, during said period, was the owner and holder of four hundred and five shares of the capital stock of said bank.

2. That the defendants were, during the year 1874, and have ever since been, the assessors of the city of Albany, constituting the board of assessors of said city.

3. That the several persons and corporations mentioned in the second count of the complaint in said year 1874, owned and were assessed by the defendants, as such assessors, for the number of shares respectively of the stock of said association set forth in said second count.

4. That the defendants, as such board of assessors, did sign and certify the assessment-rolls for the Sixth ward of the city of Albany, including said assessment of the plaintiff and of said persons and corporations mentioned in the second count of the complaint, in the form prescribed by law, namely, by chapter 86 of the laws of 1850, and did in November, 1874, deliver the same to the supervisor of said Sixth ward, who delivered the same to the board of supervisors of the county of Albany at their next meeting, held in the same month. That the said board of supervisors annexed to the name of the plaintiff upon said assessment-roll; on account of and based upon said assessment of said shares, a tax of $1,820.50, and to the names of the persons and corporations mentioned in the second count of said complaint respectively, the several amounts mentioned in said second count as taxes on account of their respective assessments on the value of their shares of stock in said banking association, and delivered said assessment-roll to the receiver of taxes of the city of Albany on or before the tenth day of December, 1874, having first annexed thereto their warrant, under their hands and seals, commanding said receiver to collect the sums therein mentioned as alleged in the complaint; and that the said receiver did thereupon cause notices to be published and served, and issued his warrant to the marshal of said city, as alleged in said complaint.

5. That the said marshal, under and in pursuance of said warrant to him issued by said receiver of taxes, and in consequence of the said assessments, did, on or about the 30th day of April, 1875, levy on and seize certain National bank bills belonging to plaintiff, amounting to and of the value of $1,908.42, and did also levy on and seize certain other bank bills the property respectively of the persons and corporations mentioned in the second count of said complaint, and amount-

ing in the aggregate to and of the value of $11,130.72, and that the amount of the bills so levied on and seized belonging to each of said persons and corporations is correctly set forth in said second count of the complaint, and that said bank bills of plaintiff and said other persons and corporations were so levied on and seized without the consent of plaintiff and said other persons and corporations but against his and their protest.

6. That the said persons and corporations mentioned in said second count of the complaint, before the commencement of this action, duly assigned and transferred to the plaintiff all and each of their claims against the defendants, by reason of the matters alleged in the complaint, and that the plaintiff thereby became and is the owner and holder thereof.

7. That the plaintiff was in 1874, a resident of the 14th ward of the city of Albany, and was assessed therein for personal property, and his shares in said National Exchange Bank were assessed to him in the 6th ward of said city, in which the bank was situated.

8. That the defendants assessed all the shares of the said National Albany Exchange Bank at their par value, which was $100 a share, less a deduction of ten per cent. for the assessed value of the real estate owned by the bank, leaving the assessed value of each share $90. The defendants did not inquire as to the actual value of such shares. They assessed the shares to the share-holders in the Sixth ward of said city without reference to their actual residence, in pursuance to the provisions of chapter 761 of the laws of the State of New York of the year 1866.

9. That the defendants assessed the holders of all the shares of the several banks in the city of Albany in said year in the same way; that is, at their par value, less a deduction for the value of the real estate owned by each bank, and did not inquire or endeavor to ascertain the actual or market value of each share.

10. That among the banks of the Sixth ward of the city of Albany was a bank organized under the laws of this State, called the Mechanics' and Farmers' Bank, a great majority of the share-holders of which were in 1874, residents of the State of New York. The capital of this bank was $350,000; its surplus was about $710,000; the market value of its shares about $300 each. The share-holders of this bank were assessed and required to pay taxes only on the par value of said shares, which was $100 a share, less the assessed value of its real estate.

11. That both the Mechanics' and Farmers' Bank and the National Albany Exchange Bank made their reports in the year 1874 before the first day of September; the former to the superintendent of the banking department of the State of New York, the latter to the comptroller of the currency at Washington, which reports showed the capital, surplus, and financial condition of said banks respectively as above found, and were published in a public newspaper of the city of Albany prior to September 1st, 1874.

12. That the assessed value of each share of the Mechanics and Farmers' Bank, after deducting the assessed value of the real estate of the bank, was $80, and the amount of tax collected upon each share of the National Albany Exchange Bank (excluding the real estate) was larger than upon each share of the Mechanics' and Farmers' Bank, although the shares of the latter bank were of more than double the value of the other.

13. That four of the assignors of the plaintiff, the Commerce Insurance Company, William J. Blackhall, Adam Shields, and Francis Vail were residents of the said Sixth ward in 1874, and that said Shields paid taxes on an assessment for $8,000 of personal property, and said Vail on an assessment for $2,000 of personal property, in addition to the assessments upon their shares of said Exchange Bank in said ward.

14. That there was in 1874 an individual banker doing business under the laws of this State, whose bank was located in the said Sixth ward, and was known as the Hope Banking Company, who resided in the town of New Scotland, and out of the city of Albany. The capital invested in said banking business was $100,000. Neither this bank nor the owner thereof was assessed or taxed in the city of Albany.

15. That the defendants did not, in 1874, assess for purposes of taxes, nor attempt to so assess any individual banker as such in the city of Albany, under the provisions of chapter 761 of the laws of 1866.

16. That there were in 1874 a large number of corporations other than banks owning personal property located in the city of Albany. None of the share-holders of said corporations were assessed on their shares in said corporations, some of said corporations were assessed and taxed, but none of them were assessed or paid taxes on their entire capital; some of said corporations claimed, and were allowed, deductions by reason of their property being invested in United States securities; most of the holders of shares in said corporations were residents of this State.

17. That there were in the city of Albany in 1874, several building, mutual loan, and accommodating fund associations founded under and in pursuance of chapter 122 of the laws of 1851. Some of the associations had a considerable amount of money loaned on bonds and mortgages. One of them (No. 4) had almost $50,000 so loaned on bond and mortgage. None of said associations were assessed or taxed in 1874, nor were any of the share-holders or members of such associations assessed or taxed on their shares or interest therein.

18. That real estate in the city of Albany in the year 1874 was assessed for the purpose of taxation at only about forty or fifty per cent. of its actual value.

19. That there was in 1874, in the city of Cohoes, Albany county, a bank called The Manufacturers' Bank, organized under the laws of this State, the shares of which were actually worth their par value, which were assessed by the assessors of Cohoes, for the purposes of taxation at only fifty per cent. of their par value. Personal property and real estate in said city of Cohoes were, in the year 1874, assessed for the purpose of taxation at only one-third of their actual value.

20. There was in the city of Schenectady, in the State of New York, in 1874, a bank organized under the laws of this State, called The Schenectady Bank, the shares of which were worth fifteen per cent. above par, which were assessed for the purpose of taxation to the share-holders thereof at only 50 per cent. of their par value. Personal property in said city of Schenectady was in said year assessed at only about one-third of its actual value.

21. There was in 1874, in the city of Binghamton, in this State, a bank organized under the laws of this State, called The Susquehanna Valley Bank, the capital of which was $100,000 and its surplus about $34,000, the shares of which were assessed for the purposes of taxation at twenty-five per cent. of its capital and surplus, after deducting the value of its real estate. Personal property in said city was in said year assessed for such purposes at only about one-fourth of its value.

22. That there was in 1874, in the village of Amsterdam, in this State, a bank organized under the laws of this State, called The Manufacturers' Bank, the shares of which were worth par, which were assessed for purposes of taxation at forty per cent. of the par value thereof, and personal property in said village was in said year assessed at only forty per cent. of its par value.

23. That there was in 1874, in the city of Utica, a bank organized under the laws of this State, called The Oneida County Bank, the shares of which were worth twenty per cent

above par, which were assessed for purposes of taxation at only fifty per cent. of the par value thereof, and personal property in said city of Utica was in said year assessed for purposes of taxation at only one-seventh of its actual value.

24. That there was in the city of New York, in 1874, a corporation called The United States Trust Company, the capital of which was two millions of dollars, and the share-holders of which were not assessed or taxed on their shares, but the company was assessed and taxed on $600,000 personal property, and $400,000 for real estate. The remainder of its capital and surplus were exempted by reason of being invested in United States bonds.

25. There was also in the city of New York, in 1874, a corporation called the National Trust Company, the capital of which was one million dollars, and which held deposits amounting to $3,500,000. The share-holders of this corporation, of whom a large portion resided in the State of New York, were not assessed or taxed upon the value of their shares. And said corporation was entirely exempted from taxation for personal property by reason of its investment in United States government securities.

26. That personal property in the State of New York in 1874 was assessed at unequal rates in the various counties of the State, ranging from one third or less of its actual value in some counties to about four-fifths of its actual value in others.

27. That the shares of banks, National and State, were the only kind of personal property which in 1874 was assessed for purposes of taxation by special list separate from the other personal property of the owner or persons assessed, and bank shares were assessed in that manner throughout the State.

28. That persons indebted were by the laws of the State of New York entitled to be allowed a deduction of their indebtedness from the amount of their personal property, but by the construction given to these laws by the courts, owners of bank shares were not entitled to such reduction from the value of their shares. No application for such reduction however was made by the plaintiff or his assignors.

29. That in the case of all corporations other than banks, the corporation itself was in 1874 liable to assessment and the share-holders thereof were not liable to assessment for purpose of taxation, and such other corporations were entitled by law to a deduction from the assessed valuation of their personal property, of the amount of their indebtedness and also of the amount of their investment in United States bonds.

30. That the defendants as assessors of the city of Albany did not in 1874 examine the records in the county clerk's office nor the records in the surrogate's office for the purpose of ascertaining property subject to taxation, nor did they make inquiries as to the rate at which moneyed capital in the hands of individual citizens of the State was assessed or taxed in the State of New York outside of the city of Albany.

31. That the assessment of the shares in the several banks located in the city of Albany in 1874 being based upon the par value of the shares without reference to the surplus of the banks, the shares of the plaintiff and his assignors in the National Albany Exchange Bank were assessed at a higher rate in proportion to their actual value, inclusive of surplus, than the shares of the aforesaid Mechanics and Farmers' Bank; and by reason of such mode of assessment the amount collected by taxation from the plaintiff and his said assignors upon their said shares was larger in proportion to the actual value of the shares than the amount collected by taxation from the owners of shares of said Mechanics' and Farmers' Bank in proportion to the actual value of those shares.

32. That the defendants, as such assessors, in making the assessments hereinbefore found, upon the shares held by the plaintiff and his assignors in the National Albany Exchange Bank, had jurisdiction of the property and of the persons and corporations assessed and acted in good faith and without malice, and their proceedings were regular.

As conclusions of law I find and decide that the defendants are not liable in this action by reason of any of the matters or things proven herein and that said defendants are entitled to judgment, dismissing the complaint with costs.

Dated June 15th, 1877.

A. SCHOONMAKER, JR., *Referee.*

TWELFTH. OPINION OF THE U. S. SUPREME COURT IN THE PEOPLE V. WEAVER, (as reported in 100 U. S., 539).

Mr. Justice MILLER delivered the opinion of the Court.

The law of the State of New York for taxation in the county of Albany, enacted in the year 1850, contains the following section:

"Sec. 9. If any person shall at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In the year 1866 the Legislature of that State enacted on thissubject another law, the first section of which reads as follows:

"SECTION, 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any protion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

William J. Weaver, Edward Brennan and Robert H. Wier, the defendents in error constituting the board of assessors of the city of Albany for the year 1875, assessed against Chauncey P. Williams, the relator, the sum of $38,250 for taxation on account of shares owned by him in the National Albany Exchange Bank, organized under the general banking act of Congress. He appeared before this board in due time and demanded the reduction of this sum to the amount of one dollar and accompanied the demand with this affidavit:

"CITY AND COUNTY OF ALBANY, ss:

"I, Chauncey P. Williams, being duly sworn, do depose and say that the value of personal estate owned by me, including my bank stock, after deducting my just debts and my property invested in the stock of corporations or associations liable to be taxed therefor, and my investments in the obligations of the United States, does not exceed the sum of one dollar.

"C. P. WILLIAMS.

"Subscribed and sworn before, this 28th day of September, 1875.

"JAMES MAHER,
"*Notary Public.*"

The defendants refused to make this deduction, and under the procedure in the courts of New York, which allows of an amicable suit on an agreed statement of facts, the case finally came to the Court of Appeals of that State. The judgment there being in favor of defendants, the people of the State of New York on the relation of Williams bring the record to this court by writ of error. Three questions were raised and decided in the Supreme Court and its judgment was affirmed in the Court of Appeals. They are thus stated in the record:

"The case coming on for argument on the submission thereof, after hearing Mr. Hale, of counsel for relator, and Mr. Peckham, of counsel for defendants, the court decided:

"1*st*. That it was not the duty of the defendants, as assessors of the city of Albany, to comply with the demand made by said relator, and reduce his assessments to the sum of one dollar, and answer the first question submitted in the negative.

"2*d*. That under the law of the State of New York, referred to in the second question, and passed April 23, 1866, the defendants, as such assessors, were justified in refusing to reduce the relator's assessment on his shares of bank stock mentioned in said submission to the sum of one dollar, and answers the second question in the affirmative.

"3*d*. That the said law of the State of New York, passed April 23, 1866, is not in violation of any law of the United States relating to the amount of taxes on shares of National Banking Associations, and answers the third question submitted in the negative.

"Judgment is, therefore, ordered for the defendants against the relator, with costs."

Of the second of these propositions this court has no jurisdiction, but must accept the decision of the highest court of the State that the act of 1866 took the money invested in bank shares out of the general provision of law of 1850, which allowed a deduction of the debts owing by the share-holder from the value of the personal property, as a basis for laying the tax. In that respect we are bound by the decision of the Court of Appeals as the true construction of the State statute. The first proposition is but the necessary result of the case, if the other two are decided in favor of defendants by that court. We have thus left for our consideration the third proposition, which being decided against a right asserted by plaintiff under the act of Congress establishing the National banking system, presents a question reviewable by this court. We proceed to consider it. The Court of Appeals delivered no formal opinion in the present case, but in the entry of their judgment, which is part of the record, they say: "This judgment is upon the authority of the former decision of this court rendered in the case of *The People* v. *Dolan and others* (36 N. Y. R., 59)."

The opinion in that case is before us. It decides directly the question now presented, and if sound justifies the judgment of the court in this case. We have given it the careful consideration which the high character of the court demands at our hands. The question arises on the provision of the National Bank law concerning taxation of the shares of the banks, which is thus expressed in Sec. 5,219 of the Revised Statutes, in force at the time of this assessment:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located, * * * subject only to the two restrictions, that taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It cannot be disputed—it is not disputed here—nor is it denied in the opinion of the State court, that the effect of the State law is to permit a citizen of New York who has moneyed capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. Nor inasmuch as nearly all the banks in that State and in all others are National banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the National bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is whether Congress, in passing the act which subjected these shares to taxation by the State, intended by the very clause which was designed to prevent discrimination between the National bank shares and other moneyed capital, to authorize such a result.

That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares, is abundantly established by the cases of *McCulloch* vs. *The State of Maryland*, 4 Wheaton, 316; *Weston* vs. *The City Council of Charleston*, 2 Peters, 449; *Osborne* vs. *The United States Bank*, 9 *Wheaton*, 738.

As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the States to tax these shares, it was foreseen—the cases we have cited from our former decisions showed too clearly—that the State authorities might be disposed to tax the capital invested in these banks oppressively.

This might have been prevented by fixing a precise limit in amount. But Congress with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said, you may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to

the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress, can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may by a narrow interpretation of the act of Congress and by skillfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State Government to fall with unequal weight on the subject of taxation thus surrendered to it by the National government.

The argument by which this view is supported is founded on the assumption that while Congress limited the State authorities in reference to the ratio or percentage levied on the value of these shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of State regulation. The State can, therefore, adopt any arbitrary or conventional system of valuation as a basis of taxation, however unequally or unjustly it may operate, and however it may discriminate against bank shares, provided the percentage of the tax levied in this valuation is the same in all cases. If, for instance, the tax is two per cent. on all personal property, the argument is that the act of Congress is not violated, if the valuation on the money of the citizen invested in State bonds is, by statute, one-half its real value, and that on bank shares is its full value, or as in the statute of the State now under consideration, the taxpayer is allowed an exemption from taxation in whole or in part, as regards his State bonds, while none is allowed in reference to bank shares.

"Taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Seizing upon the word *rate* in this sentence as if disconnected from the word assessment, and construing it to mean percentage *on any* valuation that might be made, the Court of Appeals arrive at the conclusion that, since that percentage is the same in all cases, the act of Congress is not infringed. If this philological criticism were perfectly just, we still think the manifest purpose of Congress in passing this law should prevail. We have already shown what that was. But the criticism is not sound The section to be construed begins by declaring that these shares may be "included in the valution of the per-

sonal property of the owner, in assessing taxes imposed by authority of the State within which the association is located." This *valuation*, then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is taxation. In what respect shall it not be greater than *the rate assessed* upon other capital? We see that Congress had in its mind an *assessment*, a *rate* of assessment and a *valuation*, and taking all these together the taxation on these shares was not to be greater than on other moneyed capital.

"When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business." "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district." As the word is more commonly employed, an assessment consists in the two processes of *listing* the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * Taxation by valuation cannot be apportioned without it. (Cooley Taxation, 258–9; Burroughs Taxation, page 198, section 94) So, also, Judge BOUVIER defines assessment to be determining the value of a man's property or occupation for the purpose of levying a tax. *Determining the share of a tax to be paid by each individual.* Levying a tax (1 Bouvier, 154). These definitions show that in the best use of the language employed by Congress we are justified in looking to the rule of valuation adopted by the State in assessing taxes on these shares, as well as to the uniformity of percentage, to ascertain whether the congressional restriction has been violated.

It is said, however, that the judgment of the State court is supported by the decision of this court in *People* v. *The Commissioners*, 4 Wall., 244. The specific question now before us was not involved in that case. The only matter before the court was whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in the negative, and it is all that was decided or could be

decided. The sentence in Mr Justice NELSON's opinion, on which the argument is founded, reads thus:

"The answer is, that upon a true construction of this clause of the act, the meaning and intent of the law-makers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

If we give to the phrase "rate of taxation" in this sentence no more than its proper force, and if we observe that the learned judge speaks of the proportion or percentage *in* the valuation, not *on* it, as it is misquoted, we have the idea which we have already supposed to be the true one in the minds of the law-makers. However this may be, we feel quite sure that the question of limiting the effect of the act of Congress to a discrimination in the percentage levied as a tax, without regard to equality in the valuation on which that tax was levied, was not before the court, and was not intended to be decided. And in our view such a proposition is untenable.

We are, therefore, of the opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of National bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress, and the judgment of that court will be reversed and the case remanded for further proceedings in conformity to this opinion.

United States Supreme Court,

No. 847.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,

Plaintiffs in Error.

vs.

EDWARD N. STANLEY.

BRIEF OF DEFENDANT IN ERROR.

GEORGE F. EDMUNDS & MATTHEW HALE,
Of Counsel.

No. 847.

SUPREME COURT

OF THE

UNITED STATES.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,
Plaintiffs in error.

v.

EDWARD N. STANLEY,
Defendant in error.

Brief of Defendant in error.

This case comes before the court upon error to the Circuit Court for the Northern district of New York to review a judgment rendered in that Court, in favor of the defendant in error, for the sum of $62,288.18. The action was brought by the defendant in error, a citizen of the State of Illinois, as assignee of certain stockholders of the National Albany Exchange Bank to recover back taxes forcibly collected from said stockholders, and paid into the treasury of the county of Albany upon assessments made in the year 1873 to 1878, both inclusive.

The complaint, containing twelve counts, takes up the first 44 pages of the transcript of the record. The first count is for tax collected of Chauncey P. Williams in 1874; the second is for tax collected from Mrs. Martha P. Williams in 1874; the third to the seventh counts, both inclusive, are for taxes collected of Chauncey P. Williams in the year 1875, 1876, 1877, 1878 and 1879 respectively; the eighth to the twelfth counts, both inclusive, are for taxes collected from other stockholders in said bank in the respective years named.

The case was tried before Judge Wallace, without a jury, at a term of the court held in the city of Albany in October, 1880. The decision of the Judge may be found at pages 48 to 50; the judgment on page 50; bill of exceptions on page 51 to 53, both inclusive.

The facts alleged in the complaint and found by the court in regard to the citizenship of complainant, the citizenship and powers and liabilities of the defendant, the organization and capital of the bank, the ownership of the shares of capital stock, the assessment of the stockholders named in the complaint by the board of assessors of the city of Albany, the names and residences of such stockholders, the collection of taxes from said stockholders, the payment of the same to the county treasurer of the county of Albany, the demand made by Chauncey P. Williams of the county treasurer before the commencement of the action, the amounts collected and the times of payment, the assignments by the respective stockholders of the bank of their claims against the county of Albany by reason of the matters alleged in the complaint, and that the plaintiff was the owner and holder of such claims at the time of the commencement of the action, were admitted upon the trial. (See folio 192.)

It was also admitted that the sums therein named were not paid voluntarily by the stockholders, but were forc-

bly collected by the marshal of the city of Albany, under a warrant issued to him by the receiver of taxes of said city, pursuant to a warrant issued to said receiver of taxes by the board of supervisors of the county of Albany upon the property of the stockholders respectively, as alleged in the complaint.

(See Third finding, folio 182, and admission, folio 192.)

Also that the said assessments were made and said amounts collected and received by the county treasurer under color of the Act, chap. 761, of the laws of 1866, and not otherwise.

(See Fourth finding, folio 183, and admission, folio 192.)

In the fourth count it is alleged that Chauncey P. Williams, in pursuance of the act relating to the assessment and collection of taxes in the city of Albany, being chap. 86 of 1850, presented to the assessors an affidavit that the value of the personal estate owned by him, including his bank stock, after deducting his just debts and his property invested in property of corporations or associations liable to be taxed therefor, and his investments in the obligations of the United States, did not exceed one dollar, and requested the board of assessors to reduce his assessment to the amount of one dollar, but that the board refused to make such reduction, although the said chap. 86 required said assessors to make such reduction from the assessment of any taxable inhabitant of said city upon the presentation to them of such affidavit, and although the board did make such reduction from the assessment of the personal estate other than bank stock of every taxable inhabitant of said city who made and presented to the board such affidavit.

That the said Williams applied to the Supreme Court of the State of New York for a writ of mandamus to compel said assessors to make such reduction, but the New York Supreme Court denied such application on the

ground that the act of 1866 did not permit such reduction, &c., and that the Court of Appeals affirmed the said decision and jugdment of the New York Supreme Court, and that the Supreme Court of the United States upon writ of error reversed the judgment of the Court of Appeals, and held that the said act of 1866, in that it did not permit the reduction for indebtedness from the assessment of bank stock, which by the laws of the State of New York was required to be made from the assessment of every other kind of personal estate and moneyed capital was in conflict with the law of the United States and void, and that said assessment, on the stock of said Williams, was illegal and unauthorized (folios 44 to 47.

These allegations were admitted to be true and found so by the court. (See Seventh finding, folio 185, and admission, folio 192.)

The court below also found as a fact that the said act chap. 761, of the laws of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations in the assessment thereof for taxation, although such deduction of debts of the owner was, at the time of the assessments alleged in the said complaint, permitted and required by the laws of the State of New York to be made from the value of every kind of personal property and moneyed capital other than bank stock, in assessing the same for the purpose of taxation. (Sixth finding, folio 184.)

To that part of the Sixth finding to the effect that chap. 761 of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations in the assessment thereof for taxation, the plaintiff in error excepted (folio 198.) It was proved as a fact however, that no deduction for indebtedness had been allowed by the assessors of the city of Albany in assessing bank stock under said law of 1866, since the decision

of the case of *The People against Dolan*, 36 *N. Y.*, 59, in the year 1867. (fol. 194.)

And it is stated in the bill of exceptions that the Sixth finding of the court was founded upon Statutes of the State of New York, and the decisions of the courts of said State and upon the facts above stated, and upon no other evidence. (fol. 194.)

It was stipulated on the trial that either party may refer, upon any argument in the action, to any law of the State of New York, or to any reported decision of any court bearing on the questions at issue without proof, a if the same had been duly proved and given in evidence. Several of these statutes and decisions are referred to in the bill of exceptions, and it is understood that such statutes and reported decisions and any others bearing upon the case are to be considered as a part of the bill of exceptions, and may be read by either party on the argument, from the printed volumes in which they appear (folio 192 to 194.)

The following legal propositions are understood to be conceded:

1. That an action lies against the board of supervisors of the county to recover the amount of an illegal tax forcibly collected and paid into the county treasury.

> Newman v. Supervisors of Livingston Co., 45 N. Y., 676.
> National Bank of Chemung v. City of Elmira, 53 N. Y., 49.

And that it is not essential to the maintenance of an action to recover back moneys collected under an unconstitutional and void assessment that such assessment should first be judicially vacated.

> Horn v. Town of New Lots, 83 N. Y., 100.

2. That the plaintiff is entitled to recover the amount claimed in the fourth count ($1,409.33) with interest from May 29th, 1876, being the tax as to which Mr. Williams claimed his reduction for indebtedness, which was the subject of the *mandamus* proceedings which were taken by writ of error to the Supreme Court of the United States and decided in *The People ex rel Williams v. Weaver*, 100 *U. S.*, 539.

3. That the plaintiff is also entitled to recover the other amounts claimed so far as the taxes assessed and collected or any part of them were unauthorized and illegal. The question in dispute is whether the taxes in question or any of them (except the amount mentioned in the fourth count) were in law *illegally* assessed and collected.

POINTS OF DEFENDANT IN ERROR.

FIRST. There can be no doubt that the court below had jurisdiction of the case.

Such jurisdiction is expressly given by the first section of the act to determine the jurisdiction of the Circuit Courts of the United States, approved March 3d, 1875.

That act provides that "the Circuit Court of the "United States shall have original cognizance con- "current with the courts of the several States, of all "suits of a civil nature, at common law, or in equity,

"where the matter in dispute exceeds, exclusive of "costs, the sum or value of fifty dollars, and arising "under the Constitution or laws of the United "States."

The matter in dispute in this case arises under the laws of the United States. Chap. 761 of the laws of 1866 is alleged to be invalid, because in conflict with the laws of the United States. The language of the act above quoted is taken from that provision of the constitution providing that the judicial power of the United States "shall extend to all cases in law and equity arising under this constitution or laws of the United States", &c. Art. 3, § 2. And it has been repeatedly held that a case may be truly said to arise under the constitution or laws of the United States whenever its correct decision depends upon the construction of either.

Cohen v. Va., 6 Wheat., 378.
Tenn. v. Davis, 100 U. S., 257, 264.

The power of Congress to confer additional jurisdiction upon circuit courts within the limits prescribed by the constitution is discussed and affirmed in

The Moses Taylor, 4 Wall., 411-429.

2. The circuit court also had jurisdiction by reason of the citizenship of the parties, irrespective of the subject matter of the suit, the plaintiff being a citizen of Illinois and the defendant a citizen of New York.

The prohibition toward the end of the first section of the act of 1875, "nor shall any circuit or district "court have cognizance of any suit founded on con- "tract in favor of any assignee unless a suit might "have been prosecuted in said court thereon if no "assignment had been made, except &c.," has no application to this case.

This is not a suit "founded on contract." It is an action based upon the wrongful taking and receipt of money, and a wrongful refusal to restore it on demand. The decisions of this court before the passage of the act of 1875, under section 11 of the judiciary act are decisive on this head.

Deshler v. Dodge, 16 How. 622.
Barney v. Globe Bank, 2 Am. L. Reg., N. S., 221-229.
Bushnell v. Kennedy, 9 Wall., 387.

That an action of this kind is not founded on contract but upon wrongful act,

See Newman v. Livingston Co., 45 N. Y., 676-689.
McClure v. Supervisors of Niagara Co., 50 Barb., 594
Howell v. City of Buffalo, 15 N. Y., 512.

The practice, pleadings, &c., in the circuit court are governed by the pleadings and forms and modes of proceeding existing at the time in like cases in the courts of record of the State.

R. S. of U. S., § 914.

Forms of action were long since abolished in the State of New York, and it was provided that a complaint must contain a plain and concise statement of facts constituting a cause of action without unnecessary repetition.

N. Y. Code of Procedure, §§ 69, 142.

There is no such action as assumpsit in the State of New York. It is not proper to allege, in that State, any promise in an action to recover upon a legal liability where there has been no promise. Facts are to be stated without any designation of the form of action so that a party by its use shuts himself out from the remedy which his facts would give him.

Plank Road Co. v. Morley, 23 N. Y., 552.
Bixbie v. Wood, 24 N. Y., 607-610.

3. There was no plea to the jurisdiction. Unless the facts therefore present a case of which the court can possibly have no jurisdiction, the question may be deemed waived.

SECOND. The taxes in question were illegally assessed and collected, because the law of the State of New York, (chapter 761 of 1866) under which such assessment and collection were made, violated the restriction imposed on such assessment and taxation by section 5,219 of the Revised Statutes of the United States, and was therefore void so far as it related to shares of stock in National Banks.

Upon this point the court is referred to the brief submitted on the part of the appellee in the case of *Hills et al. appellants v. The National Albany Exchange Bank No.* 817. It is unnecessary here to repeat the argument there stated at length. The following summary is respectfully submitted:

1. The act in question, as construed by the highest court of the State of New York, has been decided by this court to be in conflict with section 5,219 of the Revised Statutes of the United States and void as to shares in national banks.

People v. Weaver, 100 U. S., 539.

2. The reason of this decision was that no deduction for indebtedness was allowed to the stockholder from the assessment of his bank shares by the law of 1866, while the laws of New York permitted such deduction in the case of all other moneyed capital, and thus the act in question established a "greater rate" of assessment and taxation for bank stock than was imposed by law on other moneyed capital.

3. The construction given by the New York Court of Appeals to the law of 1866, and accepted as conclusive by the United States Supreme Court, was first announced in *The People v. Dolan* (36 N. Y., 59. App. p. 11). It was repeated by the same court in The People v. Weaver, as appears by the report of the case in 100 United States, 539. (See Appendix, p. 43) It was also restated by the Court of Appeals in *Williams v.*

Weaver, 75 N. Y., 30, in which the case of *The People v. Dolan* was cited with approval at page 36.

4. This court will not indulge in any conjecture as to what the New York Court of Appeals will hereafter decide in relation to the construction of the State law. This court is only concerned with what it *has* decided. Such construction is as much a part of the statute as the text itself. (*Leffingwell v. Warren*, 2 *Black*, 603.) Even if that court should, as the counsel for plaintiff in error anticipates, (as appears by his brief in the court below), reverse it own repeated adjudications on the subject, such change will not affect this case. The plaintiff's rights are fixed, and are governed by the law as construed by the former decisions. A change of judicial construction, should it occur, will have only the same affect as an amendment of the statute, which could affect only subsequently occurring cases.

Douglass v. County of Pike, 101 U. S., 677, 686, 687.

5. Looking at the act of 1865, and comparing it with the general tax law relating to the city of Albany, and the provisions of the New York Revised Statutes on the same subject, and reading the opinions in *The People v. Dolan*, (Appendix p. 11), it will be seen that the act of 1866 cannot properly be otherwise construed than as it has been by the Court of Appeals.

The general law makes it the duty of the assessors to ascertain and assess the full value of each person's

taxable personal property, "*after deducting the just debts owing by him.*"

1 New York Revised Statutes, 390, section 9.
Laws of 1850, page 126, section 6.
Appendix pp. 7, 8.

The law of 1866 requires stockholders in banks to be assessed and taxed on the *value* of their shares. (Appendix, page 4.)

The general laws give to the assessors no jurisdiction to assess anything but the *net* value of personal estate, *i. e.*, the value *after deducting debts.*

The law of 1866 gives the assessors no jurisdiction to assess anything but the *gross* value of bank stock, *i. e.*, its value without making any deduction for indebtedness.

The policy of the legislature has, for a period of nearly fifty years, been uniform to tax bank stock at its nominal or actual value, *without deduction for debts.* (Hunt, J., 36 N. Y., 63 Appendix p. 15). The valuation contemplated by the law of 1866 was intended to be a continuation of the same special system. (Id., p. 17.) The language of the act of 1866, "shall be assessed and taxed on their value," devotes the whole value to taxation without reduction for debts, as has ever been the policy of the State in reference to the property which this is made to represent, and in perfect accordance with what we have seen to have been the object of the statute. (Parker, J., 36 N. Y., 73. Appendix p. 23.)

6. This "policy" of the New York legislature, this "distinct system" or "plan by itself," as it is termed by Judge Hunt (Appendix p. 12), the main object of which is clearly shown by the learned judges, in the case of *People v. Dolan*, to be to *prevent* the reduction for debts allowed by the general statutes, in the case of other moneyed capital in the hands of individual citizens of the State, has been condemned by the United States Supreme Court as in conflict with the law of Congress. The law being pronounced void in its most essential feature, cannot be deemed valid in any part as to national banks. The subordinate powers fall with the main idea.

People v. Commissioners of Taxes, 94 U. S., 415, 418.
United States v. Reese, 92 U. S., 215.
Trade-mark cases, 100 U. S., 92, 98, 99.
Allen v. Louisana, 103 U. S., 80.

7. Chapter 596 of the Laws of 1880 is a legislative admission of the invalidity of the law of 1866.

See Laws of 1880, 1st vol., p. 888.
Appendix p. 10.

8. There is no force in the claim that the law of 1866 is void only as to those who were indebted. The general laws assume that all persons assessed for personal property are more or less indebted.

It would have been useless for stockholders who were indebted to apply for a reduction by reason of

such indebtedness, for such application if made must necessarily have been denied under the act of 1866, as construed by the New York courts. Indeed the assessors had no jurisdiction to make such reduction—the State law under which they acted did not permit it.

The law never requires the performance of an idle and useless act. *Lex neminem cogit ad vana seu inutilia.*

Boot v. Franklin, 3 Johns R., 208-210.
Loomis v. Tifft, 16 Barb. 541.
Schroeder v. Hudson R. R. Co., 5 Duer, 55.
Tacey v. Irwin, 18 Wall., 549.

9. The case of *Williams v. Weaver*, (100 U. S., 547) is no authority against the plaintiff. The question in that case was simply as to the personal liability of assessors for making an assessment under the act of 1866, it being found that they acted in good faith. The courts of the State of New York decided *against* such liability, and this court held that such decision presented no federal question that could be reviewed here. The remark in regard to the right of reduction for debts not having been raised, must be taken in connection with the subject under review, namely, the personal liability of the assessors. The remark was entirely *obiter*, but was evidently not intended by the learned justice who made it, to apply any further than as it bore upon the personal liability of the defendants in that case.

10. The law of 1866 was also void because it violated the restriction of § 5,219, by establishing a separate system for the taxation of bank stock to the prejudice of owners of such bank stock.

11. It must be noticed that in this case it is a fact, admitted by the parties and found by the court, that the assessments were made and the taxes collected under color of the Act of 1866, *and not otherwise* (fols. 183, 192). It is therefore unnecessary to inquire whether there was any other law of the State of New York under which said assessments might have been made. It is clearly shown, however, in the brief in the other case (No. 817), that there was no such law.

THIRD. The complaint also alleged that the assessments complained of were void, irrespective of the invalidity of the law of 1866, because made at a greater rate than was assessed upon shares of stock in a State bank, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York. Evidence was given upon the subject of these allegations, but they were not passed upon by the court, and the case was decided solely upon the ground of the invalidity of the State law. (See folios 194 to 197.)

We do not claim, therefore, that the judgment can be upheld (except as to the fourth count) unless the court should concur with the court below, that the State law was invalid; but in such case it would not follow as the plaintiffs in error claim in their brief that final judgment

should be ordered by this court against the defendant in error, except as to the conceded claim in the 4th count; but a new trial should be ordered upon which the defendant in error would be at liberty to establish the allegations which have not yet been passed upon.

FOURTH. While it is not supposed that this court will be influenced by any supposed consequences of its decision, it is still proper to state that no serious evil can result from the affirmance of the judgment. The law of 1866 has been superseded by the law of 1880 which permits the deduction for indebtedness prohibited by the former. No taxes voluntarily paid by any stockholder can be recovered back; and, so far as we can learn, the National Albany Exchage is the only bank in the State of New York whose stockholders have, by refusing to make voluntary payments, put themselves in a position to recover back taxes illegally assessed. The only question is whether the defendant in error, representing the stockholders of this bank, who have from the first protested against the law of 1866, and the action of the assessors under it, shall be permitted to recover back what has illegally, and in defiance of their protests, as well as of the law of the United States, been extorted from them.

The judgment of the Circuit Court should be affirmed, with costs.

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